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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 25.

THE CALIFORNIA REDUCTION COMPANY ET AL.,
PETITIONERS,

vs.

THE SANITARY REDUCTION WORKS OF SAN FRANCISCO, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR RESPONDENT.

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SUPREME COURT OF THE UNITED STATES.

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THE CALIFORNIA REDUCTION COMPANY ET AL.,
PETITIONERS,

v.

THE SANITARY REDUCTION WORKS OF SAN FRANCISCO, RESPONDENT.

BRIEF FOR RESPONDENT.

Statement of the Case.

On November 18, 1895, the board of supervisors of the city and county of San Francisco adopted a resolution directing the clerk of said board "to advertise for proposals for the sale of a franchise conferring the right and sole privilege to cremate garbage and house refuse or to dispose of the same by some process equally effective and unobjectionable, free of all cost or charge to the city and county," as specified in the provisions of a proposed order to accompany such advertisement (Rec., p. 309). The board assumed to take this action in accordance with the terms of an act of the legislature of California "relative to granting of franchises," ap-

proved March 23, 1893 (Stats. Cal. 1893, p. 288). In answer to the advertisement, three proposals were received, and on January 6, 1896, were opened by the board and referred to the committee on health and police.

In due course the committee reported, and on February 17, 1896, an order, No. 2965, was passed by the board awarding the aforesaid privilege to one F. E. Sharon, which order is found in full in Appendix "A" to this brief. The validity of this award was contested by one L. V. Merle, who claimed to have been the best and highest bidder for the privilege; but the superior court of the city and county of San Francisco upheld the award to Sharon, and from this decision no appeal was taken (Rec., pp. 367, 368).

The SANITARY REDUCTION WORKS OF SAN FRANCISCO, respondent herein, succeeded to the interest and rights of F. E. Sharon, the grantee of such franchise, and proceeded to erect works in conformity with its terms, at an expense of about $180,000, and notified the board of supervisors of their completion. Thereupon the board passed another order, No. 12 (second series). This order, after reciting the objectionable dumping of garbage and other refuse substances which for twenty years hitherto had prevailed, and the steps taken and efforts made to abate such nuisance, and also the completion by respondent of its works, and its readiness to receive, cremate, and destroy all such substances in accordance with the terms and under the conditions of the franchise granted by said order No. 2965, forbade the dumping or depositing after a certain date of such substances, "upon any street, lot or lands, within said city and county, or in any water or waterways within said city and county," and required the delivery of all such substances at and to the crematory of the Sanitary Reduction Works, "there at the expense of the person, company, or corporation so conveying the same" to be "cremated and destroyed or subjected to such disposition and treatment as will secure and effect a complete combustion of all gases and odors arising there-

from, as provided in the franchise aforesaid." A penalty for any violation of the provisions of the order is added, and it is made the duty of the board of health to aid in the enforcement of the order. This order was approved by Mayor James D. Phelan on November 4, 1897, and is found in full in Appendix "B" to this brief. It was shown in evidence in the circuit court that two payments had been made by the sanitary reduction works on account of the 2 per cent. of gross receipts agreed to be paid to the city and county of San Francisco, the sum of $140.21 for the period from November 1, 1897, to December 31, 1897, and the sum of $931.68 for the year ending December 31, 1898 (Rec., pp. 15, 114, 332). These sums were accepted by resolution of the board of supervisors and cover the entire period up to the commencement of proceedings in the circuit court (Rec., p. 332).

On November 22, 1898, one of the petitioners herein, THE CALIFORNIA REDUCTION COMPANY, a corporation which had been incorporated under the laws of the State of Colorado about three months before for the purpose of gathering garbage in the city and county of San Francisco and of removing it therefrom to an adjoining county, entered into an agreement with over a hundred scavengers of the said city and county under which these latter agreed, among other things, to bring and deliver to said corporation at the place or places designated by it in San Francisco such of the various refuse substances covered by the aforesaid orders, Nos. 2965 and 12 (second series), as they should gather, and to pay to it a slightly less sum per cubic yard than the maximum allowed in the first of said orders (Rec., pp. 100, 110, 333). Several provisions favorable to the scavengers were inserted in the agreement, a significant one being to protect them from all arrests and to pay all expenses for defending any of them who might be arrested by reason of their delivering to said corporation any of the articles therein named. In order further to carry out its purposes the California Reduction Company leased two barges and made other arrangements to transport

by water to San Mateo county the garbage and refuse matter which should be delivered to it in San Francisco under such agreement or otherwise. The California Reduction Company, as well as the individual petitioners associated with it in these proceedings, claimed the right to convey, deliver, and deposit within the city and county of San Francisco the various refuse substances particularly set forth in the two orders hereinabove mentioned, contrary to and in violation of their plain terms and provisions.

To put an end to these acts and practices on the part of petitioners and to enforce its rights under the said orders, the Sanitary Reduction Works of San Francisco on December 19, 1898, brought a suit in equity asking for a perpetual injunction to prevent the California Reduction Company and about 140 scavengers in San Francisco, who were still subjects of the King of Italy, from removing the refuse substances and materials specified in said orders and to restrain them from any further infringement upon its exclusive rights and privileges thereunder. A preliminary injunction was issued by the circuit court in accordance with the prayer of the bill of complaint (Rec., pp. 88 to 96), and after the taking of voluminous testimony a final decree was entered on January 7, 1902, perpetually enjoining and restraining the petitioners herein and all of them "from directly or indirectly removing from the city and county of San Francisco, State of California, any house refuse, butchers' offal, garbage, refuse, dirt, ashes, sludge, crockery, tins, cinders, bones, and other like matter, dead animals, putrid vegetable matter, or such fish, flesh, or food as may be condemned by the board of health of said city and county, as unfit for human food, as specified in order No. 2965 or in order No. 12 (second series) of the board of supervisors of the said city and county of San Francisco, State of California, set forth in the bill of complaint herein, and from depositing or dumping at any other place in said city and county of San Francisco save and except at the works, buildings, and crematories of the complainant herein, in said city and

county of San Francisco, any of the house refuse or other materials hereinbefore described during the life and term of the contract and franchise belonging to the complainant as alleged in the bill of complaint herein, and from obstructing, hindering, or in any way interfering with said complainant in the delivery of it or in the incineration and cremation by it of any of the house refuse or other materials mentioned and described in said orders and ordinances and in the bill of complaint herein, and from diverting from the complainant any of said house refuse or other materials, and from infringing in any manner upon the rights, privileges, or franchises secured to said complainant by the aforesaid orders or ordinances, and from interfering with said complainant in the performance of any of its duties under said orders or ordinances" (Rec., pp. 85, 86). From this decree an appeal was taken to the circuit court of appeals for the ninth circuit, with the result that it was unanimously affirmed on October 3, 1903, *California Reduction Co. et al. vs. Sanitary Reduction Works of San Francisco*, 126 Fed. Rep., 29 (Rec., p. 409). The jurisdiction of the circuit court rested on diverse citizenship alone. Under well-known authorities the decision of the circuit court of appeals would therefore have been a final disposition of the case had not a writ of certiorari been granted by this court on May 31, 1904.

Colorado Central Mining Co. v. Turck, 150 U. S., 138.
Press Publishing Company v. Monroe, 164 U. S., 105.
Spencer v. Duplan Silk Co., 191 U. S., 526, and numerous other cases.
See also *Forsythe v. Hammond*, 166 U. S., 506.

To the brief filed in support of the application for this writ no reply was made, and in its absence many facts were not brought to the attention of this court which will appear herein, and a consideration of which will clearly show that the decision of the circuit court of appeals was correct, and that it is supported by a long and unbroken line of authorities in various appellate courts of the United States.

ARGUMENT.

Order No. 2965 and order No. 12 (second series) are both valid under the police power vested in the city and county of San Francisco.

In the *Slaughter House Cases*, 16 Wall., 36, 62, this court, after quoting the famous expression of Chief Justice Shaw regarding the police power, that "it is much easier to perceive and realize the existence and sources of it than to mark its boundaries, or prescribe limits to its exercise," said that—

> "This power is, and must be from its very nature incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. 'It extends,' says another eminent judge [Redfield] 'to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the State, * * * and persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the State.' Of the perfect right of the legislature to do this no question ever was, or, upon acknowledged general principles, ever can be made, as far as natural persons are concerned."

This power is held, in *Hannibal & St. J. R. Co. v. Husen*, 95 U. S., 465, to include generally the making of all "regulations promotive of domestic order, morals, health and safety." In *Lawton v. Steele*, 152 U. S., 133, 136, the police power, according to this court, "is universally conceded to include everything essential to the public safety, health and morals, and to justify the destruction or abatement, by sum-

mary proceedings, of whatever may be regarded as a public nuisance."

After citing numerous particular examples of its proper exercise, the court continues:

> "Beyond this, however, the State may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests."

A recent opinion, called forth by a case (*Dupont v. District of Columbia*, 20 App. Cas. D. C., 477, 487) very similar to the one now before this court, contains the following comprehensive statement:

> "The police power is the emanation of that inborn principle of human nature which led men into society and created the body politic to which sovereignty pertains for the purpose of securing safety, order and the commonweal. To effect these ends, the Government is invested with the power to make reasonable regulations restrictive of individual impulse. As population increases, in rapid proportion, new physical conditions are developed which suggest, as reasonable, regulations and restraints of persons and property before unknown. As civilization advances with increased and deeper knowledge, science makes new discoveries in respect to the dissemination of disease through infection which necessitate radical changes in methods for the protection of human life."

In his work on Municipal Corporations, section 141, Judge Dillon, speaking of police and sanitary regulations, says:

> "It is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffers injury, it is either *damnum*

absque injuria or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure."

See—

Harrington v. City of Providence, 20 R. I., 235.
Ex parte Tuttle, 91 Cal., 589.
Ex parte Lacey, 108 Cal., 326.
Tenement House Department of the City of New York v. Moeschen (1904, N. Y.), 72 N. E. Rep., 231.

In the city and county of San Francisco the board of supervisors was, and is, the body or board which formed the legislative department of the government of that municipality.

McDonald v. Dodge (1893), 97 Cal., 112, 114.
Harrison v. Roberts (1904), 78 Pac. Rep., 537, 540.

And as such was entrusted with the exercise of the police power therein.

The constitution of California (article XI, sec. 11) provides that:

> "Any county, city, town or township may make and enforce within its limits, all such local, police, sanitary and other regulations, as are not in conflict with general laws."

The legislature of the State, by an act approved April 25, 1863, and in force at the time the orders in question were passed, provided, among other things, that:

> "The board of supervisors of the city and county of San Francisco shall have power, by regulation or order, * * * 2d. To authorize and direct the summary abatement of nuisances; to make all regulations which may be necessary or expedient for the preservation of the public health and the prevention of contagious diseases; to provide by regulation for the prevention and summary removal of all nuisances and obstructions in the streets, alleys, highways, and

> public grounds of said city and county, and to prevent or regulate the running at large of dogs, and to authorize the destruction of the same when at large contrary to ordinance." Stats. 1863, p. 540, c. 352.

Commenting upon this section of said act in *Ex parte Schrader*, 33 Cal., 279, 281, the supreme court of California says:

> "It is apparent that the legislature could confer power upon the board to pass the order [upheld in that case] if it could have enacted it directly in the form of a statute in the first instance."

There can certainly be no question that the police power of the State may be delegated to a city, so far as it is necessary to protect the health of its inhabitants.

See *City of Norfolk v. Flynn* (1903), 101 Va., 473; 99 Am. St. Rep., 918.

The true character of the orders now under consideration, and their propriety and clear validity under the police power vested in the city and county of San Francisco will become manifest upon closer examination of their provisions. Both orders recite the objectionable practice which had hitherto prevailed of depositing and dumping the refuse substances upon the "lots, lands and public streets situate in the city and county and in the waters of the bay, to the prejudice of the public health." The board of health had from time to time "called attention to and condemned the disposition of such garbage and refuse matter in the filling of lots," and had "repeatedly urged the cremation of such substances to protect the public health." That this practice had become a nuisance is shown not only by these recitals but by the testimony introduced on the hearing. (See John Center's testimony, Rec., p. 280.) The board of supervisors came to the conclusion that the only effective means to dispose of such "garbage, house refuse, dead animals and putrid vegetable

matter and material of a like character" was to cremate it, or dispose of it by some process of chemical reduction. After calling for bids, they accordingly granted to one F. E. Sharon, whom they declared the highest and best bidder, his associates and assigns, for a period of fifty years, the sole and exclusive right and privilege "to cremate and destroy within the city and county aforesaid, by crematories or by a process of reduction, house refuse, dirt, ashes, cinders, sludge, crockery, tins, bones and other like matter, and any dead animals (not otherwise provided for by contract or franchise heretofore granted,) and putrid vegetable matter, and fish, flesh and food condemned by the board of health of said city and county as unfit for human food."

It will be observed that the privilege relates only to such dead animals as are not otherwise provided for by contract or franchise heretofore granted, but that after the expiration of such contract or franchise, to wit, from and after the 1st day of December, 1902, the said Sharon and his associates and assigns are given by section 6 of order No. 2965 the sole and exclusive right and privilege during the remainder of the term of their franchise to remove and dispose of the carcasses of dead animals. Care is taken, however, not to violate any of those property rights upon which counsel so earnestly and emphatically dwelt in his brief in behalf of petitioners for the writ of certiorari herein, by giving the grantee of the franchise the right to remove and to dispose of the carcasses of only such "dead animals found upon the public streets" or "in said city and county" of San Francisco "not slain for human food" as "*shall not be removed and disposed of by the owners thereof so as not to become a nuisance within six hours after the death of the same.*" For this franchise the said F. E. Sharon paid to the city and county of San Francisco the sum of $2,510, agreed to pay 2 per cent. of the gross receipts derived under it for the term of fifteen years from and after its date, and 5 per cent. of such gross receipts for the remaining thirty-five years thereof, and further

promised to construct and have in operation within 24 months a suitable building or buildings equipped and fitted up "with the necessary crematories, machinery, tools and appliances required to cremate and destroy by cremation, or by a process of reduction, all obnoxious germs and elements contained in house refuse, butchers' offal, garbage, refuse, dirt, ashes, sludge, crockery, tins, cinders, bones and other like matter, and any dead animal and putrid vegetable matter, and fish, flesh and food condemned by the board of health as unfit for human food, the works to be constructed to cremate or reduce at least 300 tons per day of the materials specified in this section, and the capacity to be increased as required from time to time." The said grantee of the franchise, his associates and assigns, were given the "right and privilege to charge and collect" for such cremation "not exceeding the sum of 20 cents per load, such load not to exceed a cubic yard," on delivery at the crematory.

The Sanitary Reduction Works of San Francisco, the assignee and successor in interest of said F. E. Sharon, completed the work and complied with the terms and conditions of the franchise conferred by order No. 2965, whereupon the board of supervisors of the city and county of San Francisco duly passed order No. 12 (second series) confirming order No. 2965, providing in section 1 as follows:

> "SECTION 1. No person, company or corporation shall on and after the 8th day of November, 1897, deposit, dump or cause to be dumped or deposited upon any street, lot or lands within said city and county or in any water or waterways within said city and county, or from any wharf or bulkhead on the water front of said city and county, except as hereinafter provided, any house refuse, butchers' offal, garbage, refuse, dirt, ashes, cinders, sludge, broken glass, crockery, tins, bones, rubbish or other like matter, or any dead animals (not otherwise provided for by contract or franchise heretofore granted by the city and county), or putrid or stinking animal or vegeta-

ble matter or fish, flesh and food condemned by the board of health, as unfit for human food.

All such refuse, butchers' offal, garbage, ashes, cinders, sludge, acids or other like substances or matter hereinbefore enumerated shall be delivered at and to the crematory of the Sanitary Reduction Works on the block bounded by Rhode Island, Alameda, De Haro and Fifteenth streets, in said city and county, and there at the expense of the person, company or corporation so conveying the same, be cremated and destroyed or subjected to such disposition and treatment as will secure and effect a complete combustion of all gases and odors arising therefrom as provided in the franchise aforesaid."

Special attention is called to the fact that under neither of these orders is the householder prohibited from destroying his garbage on his own premises if he can do so without causing a nuisance; also to the fact that no interference is designed or attempted with the "lowly calling" of scavengers, for, as pointed out by the circuit court of appeals, they are not deprived of the right to collect the garbage. They are only prevented from disposing of the garbage in any other way than by delivering it at the crematory erected by the Sanitary Reduction Works, there to be cremated and destroyed. These facts are important as justifying the assertion, which we are now prepared to make, that no reported case has questioned the validity of any ordinance or contract containing provisions similar to those in the San Francisco orders now under consideration.

The most extreme case which can be cited against the validity of the orders here called in question is that of *Iler v. Ross*, 64 Neb., 710; 90 N. W. Rep., 961; 57 L. R. A., 895. In this case an ordinance "regulating the collection and removal of dead animals, garbage, manure, ashes, filth, offal, night soil, and other refuse matter" was declared invalid on the ground that it was of too sweeping a character and "an invasion of the natural rights of the inhabitants of the city."

The principles laid down in the opinion, however, warrant the belief that the court would not have considered the San Francisco orders objectionable. The court says (p. 723):

> "There can be, in the nature of things, no reasonable necessity for the city to gather and remove from the private premises of the inhabitants the accumulations of rubbish and waste materials which are not in themselves, and when not allowed to accumulate in unreasonable quantities, nuisances. How can it be said that a necessity exists, in order to protect the public health, to enter private grounds and remove therefrom the refuse of the barn, ashes from the yard, and other material not offensive in itself, if not permitted to accumulate in large quantities and for an unreasonable length of time? By what process of reasoning can it be said that the owner may be deprived of the right to keep his premises neat and clean and remove all such material as rapidly as it may accumulate in such quantities as to warrant its disposition, and under such reasonable regulation as to the method of removal as may be imposed by the authority of the city? Why and for what reason must he engage only the city contractor to perform such services?"

While the principles announced in this case are extreme and not in harmony with the great weight of authority, as will hereafter be shown, still the San Francisco orders are in no respect open to the objections advanced by the court therein. No privilege of collecting the refuse substances has been given by these orders, and no right to enter private premises has been claimed under them. The Nebraska case expressly asserts that "the right of reasonable regulation for the prevention of nuisances of every kind, and the method of removal through and over the streets of a city of all accumulations of refuse matter, rubbish and other waste material for the purpose of sanitation, and in the interest of the general health and comfort of the inhabitants should be and is fully recognized," and that "as to those substances which

are in themselves nuisances, and for the protection of the public, require speedy and prompt abatement and removal by the city, or some one by it authorized to perform the work, the exercise of the power is in its nature a public function, to be engaged in by the city in its own behalf, or by the employment of such agencies as will best accomplish the desired result, and that regarding such matters the granting of an exclusive privilege by the city to one individual for the removal of such unwholesome substances is not an unlawful exercise of power, nor does it conflict with the principle of law opposed to the creation of monopolies or an invasion of personal rights."

The court gives its entire approval to the earlier case of *Smiley v. McDonald*, 42 Neb., 5; 60 N. W. Rep., 355; 27 L. R. A., 540; 47 Am. St. Rep., 664.

In *Smiley v. McDonald* the city of Omaha gave to the contractor for a small annual payment the right for a period of ten years "to remove and make use of all the dead animals, garbage, offal, night soil, etc., necessary to be removed, as may be required by the board of health or ordinances of said city of Omaha," the contractor agreeing on his part, in accordance with the ordinances, "to remove to some place or places at least two and a half miles outside of the corporate limits of said city, and if within three miles of the corporate limits of said city, to such place or places as may be designated by such board of health, and dispose of the same in such manner as not to cause or create a nuisance, all dead animals, garbage, manure, ashes, filth, offal, night soil, etc., as may now or hereafter during the existence of this contract be required to be removed by said ordinances, rules or regulations." A limit was placed upon the prices to be charged by the contractor, varying in amount according to the object removed. In upholding the contract the court says (42 Neb., 13):

> "But the removal of the noxious and unwholesome matter mentioned in the contract tends directly to

promote the public health, comfort and welfare, and is therefore a proper exercise of the police power. Nor is the fact that in this instance the city has by contract conferred an exclusive privilege material. From the power thus conferred upon the city is implied the duty to determine the means and agencies best adapted to the end in view. The means adopted appear to be not only a reasonable and necessary regulation, but a judicious exercise of the discretion conferred upon the city.

"That the object of all such regulations can be best attained by entrusting the work in hand to a responsible contractor who possesses the facilities for carrying it on with dispatch, and with the least possible inconvenience to the public, is apparent to all. In the case of *Vandine, petitioner*, 6 Pick., 187; 17 Am. Dec., 351, Putnam, J., referring to a similar regulation of the city of Boston, said: 'It seems to us the city authorities have judged well in the matter. They prefer to employ men over whom they have an entire control by night and by day, whose services may be always had, and who will be able from habit to do the work in the best possible way and time. Practically, we think the main object of city government will be better accomplished by the arrangement adopted, than by relying upon the labor of others over whom the government would have no other remedy than a suit for breach of contract. * * * We are satisfied that the law is reasonable and not only within the power of the government to prescribe, but well adapted to preserve the health of the city.'"

After citing many cases, the opinion concludes (p. 14):

"The alleged excess of power is a mere sanitary measure, as obviously so as the familiar and necessary quarantine for the detention of persons exposed to contagious diseases. In either case the privilege, although exclusive, is but an incident to the proper exercise of the general police power of the State."

In *Iler v. Ross* no attempt was made to overrule the case of *Coombs v. McDonald*, 43 Neb., 632; 62 N. W. Rep., 41, wherein

an ordinance was held valid against the claim that it was contrary to public policy to grant an exclusive privilege.

In the brief filed by the petitioners in applying to this court for a writ of certiorari several cases which may be called "dead-animal cases" were cited, which really have no important bearing upon the case in hand for the clear reason already pointed out that the defect which rendered invalid the ordinances passed upon in those cases was entirely absent in the San Francisco orders, and that these latter afforded ample time to the owner to remove his property, and thus prevent its becoming a nuisance. So much stress, however, was laid on these cases in the brief that it is proper to devote some space to them here.

In *Knauer v. City of Louisville*, 20 Ky. Law Rep., 193; 45 S. W. Rep., 510, the ordinance gave to the public contractor the exclusive privilege to remove out of the city of Louisville the carcasses of dead animals not slain for food or to be used in useful arts. The owner could direct the place to which they should be removed, but only upon paying such fees to the public contractor for their removal as practically left the owner no balance. The court say (p. 511):

> "The sole question in this case is whether the city can pass an ordinance which fixes the fees to be paid the public contractor for the removal of the carcass of a dead animal out of the city at such sums that their owners cannot pay them and realize anything out of them. Can the city in this indirect way confiscate the property of its owner and give it to the public contractor?"

It was shown that many animals died on the cars while being shipped, that they did not immediately become nuisances, and that before becoming such they could be sent to rendering establishments in the neighborhood of the stock yards at a very small cost compared to the fees allowed the public contractor under the ordinance. While declaring this ordinance unconstitutional in so far as it had the effect

arbitrarily to take the dead carcass from one person and to give it to another, the opinion does not overlook the fact that such dead carcasses may soon become nuisances in a populous city, and clearly recognizes the right of the municipality, under the police power, to "prescribe the manner and the time in which the owner shall remove or permit them to be removed." In denying the petition for rehearing (46 S. W. Rep., 701) the court declared it to be legal and proper for the municipality to do just what the city and county of San Francisco has done in order No. 2965, using the following words:

> "We may add that the general council may provide by ordinance that in the event the owner of a carcass of a dead animal fails to remove it within the prescribed time, or pay such reasonable fees as may be fixed for its removal, it shall become the property of the city, or of such person as may be authorized by contract with the city, to remove it; or it may be provided that upon the failure of the owner to remove it within the prescribed time, it shall become the property of the city or of such person as may be authorized to remove it."

Meyer v. Jones, 20 Ky. Law Rep., 1632; 49 S. W. Rep., 309, lays down the same rule. After quoting with approval the words given above from the second opinion in the Knauer case, the court says (p. 810):

> "The city can by ordinance compel the owner of a dead animal to remove it within a certain time, and prescribe the manner in which it shall be conveyed over the streets of the city. If the owner fails to do it within the time prescribed in the ordinance, then the city can employ such method or instrumentalities as it pleases for the removal, and fix the compensation to be paid therefor."

In this case the ordinance was declared invalid, not because excessive fees were fixed for the removal of animals, as in the Knauer case, but because it did "not give the owner

of a dead animal the right to remove or have it removed within a prescribed time before the public contractor "should take charge of it. Surely, the ordinance would not have been declared invalid if, like the San Francisco order, it had given the owner of the dead animal six hours within which to remove the carcass.

For a similar reason, the facts in *River Rendering Co. v. Bahr*, 77 Mo., 91; 46 Am. Rep., 6, clearly distinguish that case from the one now before this court. The answer therein alleged that the defendants had not purchased, removed, or interfered with such animals as had died in the city of St. Louis and been abandoned by the owners, but only such as had been shipped by railroads and boats into the Union stock yards and had not been abandoned, but were claimed and possessed by their owners, and that they had immediately removed them to their factory in Illinois before there could be any possibility of their becoming nuisances in such city. The ordinance which they were accused of violating prescribed no time limit, but, as construed by the two courts which had passed upon it, transferred "the property of A in his dead hog or bullock to B, without the intervention of courts or juries and with no formality whatever, except a notice from the police department of the city that the hog or bullock is dead, and is to be found at a given place, which may be on the owner's premises in his own possession." The court properly held that the death of a domestic animal does not terminate the owner's property, and while he may be required to make such use or disposition of the carcass as will prevent a nuisance, stench, or other inconvenience to the neighborhood, the municipal authorities cannot arbitrarily deprive him of his property by giving it to another. In this and in many similar cases the oft-quoted sentence in *Underwood v. Green*, 42 N. Y., 140, appears: "A dead hog is not *per se* a nuisance, even though it died of suffocation, and is not necessarily dangerous to public health." But with the equally well established addition, "while a dead animal is not *per se* a nuisance

it may become so, and the city, under her charter, may pass such ordinances as are necessary to prevent it from becoming a nuisance, but she must in such legislation pay a proper regard to the rights of the owner of such property."

The same principles are clearly expressed in *State v. Morris*, 47 La. Ann., 1660, 1664; 18 So. Rep., 710, and the rights of a city plainly defined and limited. The court says:

> "The city might, as a sanitary measure, after having given the owner the opportunity to dispose of his dead animals, authorize a contractor to cart them away and appropriate them to his own use. In warm climates the police of cities requires regulations that should be enforced with great vigilance to prevent nuisances injurious to health. The necessity of such ordinances would not justify the council in declaring that all dead animals found in the city, not killed for human food, are nuisances *immediately after death*. This is the effect of the ordinance.
>
> "We rest the case entirely on the ground that the owner is entitled to reasonable time after the death of the animal to dispose of it, or cart it away under the requirements of existing ordinances. The situation and the climate may render it necessary to permit very little time and opportunity for removal. In adopting ordinances which necessarily must be general, the owner may be allowed but little time, if public safety requires, for the removal of his dead animals. * * * The laws do not justify an absolute denial of all the owner's rights from the moment of death without the possibility of its becoming a nuisance before a disposition can be made in the owner's interest. The city, invested with power, claimed by the plaintiff as plenary, in regard to health and cleanliness can, under proper police regulation, permit the owner, during a brief period of time, to realize any value his dead animal may have, and at the same time carry out a scheme ample in every respect to protect public health and secure required cleanliness."

Would any court hold that in a city like San Francisco six hours' time is too brief a period to allow an owner within which to remove his dead animal?

In *State v. Morris* the court expressly says that it passes "upon the legality of an ordinance only in so far as relates to the removal of dead animals," and the attitude which it would take regarding an enactment similar to order No. 2965 of the city and county of San Francisco is clear from its ruling in *State v. Paysan*, 47 La. Ann., 1029; 17 So. Rep., 481.

Here an ordinance relative to garbage was upheld, notwithstanding the attacks similar to those urged in the case now before this court, that it was arbitrary, unreasonable, and oppressive. The court says (p. 1030):

> "With reference to the unreasonableness of the ordinance and the oppression charged, we deem it in place, preliminarily, to state that the legislature delegated the authority to the municipality to adopt needful regulations for the protection of health and to maintain cleanliness. It is true that the word 'garbage' is not used in the charter, but the equivalent is therein expressed. The council is authorized to adopt ordinances for the frequent inspection of buildings and premises, and to compel cleanliness. *This necessarily includes the authority to have garbage moved away and destroyed that is annoying to health.* The general power regarding health and cleanliness having been given, we are of the opinion that the ordinance cannot be impeached as invalid on the ground of unreasonableness." Citing numerous cases.

The court further expresses the opinion that "without reference to express power in the charter a municipal corporation does not legislate unreasonably by adopting ordinances to protect the community against the offensive and unwholesome smell of decaying vegetable and animal substances, and that such ordinances are consonant with the purpose of such incorporation and consistent with the laws."

This case also makes a fine answer to another objection urged against order No. 2965, which will be quoted at this point, though other cases will be cited in support of the same position later in this brief. The court says (p. 1031):

> "As to the grounds of the defendant that the ordinance creates a monopoly, that it divests vested rights, we think it sufficient answer to say: On this appeal we can only decide that garbage which may cause discomfort, and which is injurious to health, can be *removed* and *destroyed* under an ordinance adopted under a legislative grant of power, and that this ordinance may be adopted without creating a monopoly or divesting one of vested rights. * * *
>
> "We do not perceive that there is reason to complain of an ordinance authorizing the *removal of garbage by contract.* The city government has the power of deciding in what manner a nuisance shall be removed. In having the work done by a contractor, employed in the manner required by law, they have not exceeded the discretion with which they are vested in such matters. Such contracts are frequent, and when fairly entered into, *give no rise to legal objection.* The issues here do not justify an inference that a privilege has been granted unauthorized and reprobated by law."

In *Schoen v. City of Atlanta*, 97 Ga., 697; 25 S. E. Rep., 380, the ordinance prescribed three hours as the time within which the dead animal should be removed by the owner, but provided further that even within such time he should "remove or cause to be removed such carcass *to the place designated by the board of inspectors*, and it was upon this latter provision that the case turned. In deciding against the validity of the ordinance, the court says (p. 701):

> "A dead animal is not necessarily a nuisance, and until it does become one, due regard must be had to the property rights of the owner; but since it must necessarily become a nuisance of a very offensive and dangerous character unless some disposition is promtly made of it which will prevent its becoming

so, the municipal authorities need not wait until it has actually reached that stage before undertaking to deal with it as a nuisance. They may by ordinance prescribe that where the animal dies or is found dead within the corporate limits, it shall not be allowed to remain there beyond a specified reasonable time, and that the owner shall within that time remove it, or cause it to be removed, beyond such limits, and to a specified reasonable distance, and that unless he does so, the carcass shall be taken charge of by the agents of the corporation, and dealt with as a nuisance *per se*. We do not think, however, that they have a right to prescribe that, after the owner or his agent has removed the carcass beyond the corporate limits within the time allowed, it shall be deposited at such place only as shall be designated by the municipal authorities. When the owner has, within the prescribed time, removed it to a distance sufficiently remote to prevent its becoming in any way a nuisance to persons residing within the corporate limits, we think the municipal authorities have no further concern with it."

The conviction in this case was declared illegal because "it appeared that the animal was removed within the time prescribed by the ordinance, and to a place several miles beyond the city, where, so far as appeared, it was in nowise offensive, or a source of danger to persons in the city."

A careful examination, then, of the cases cited and so much emphasized by the petitioners in their brief for the writ of certiorari not only shows that the facts upon which they were founded are entirely different from those in the case now before this court, but also discloses principles upon which, so far as they are applicable, the validity of the San Francisco orders can be fully sustained. One other recent case not cited in the brief in behalf of petitioners, that of *Campbell v. District of Columbia* (1901), 19 App. Cas. (D. C.), 131, involves similar principles, and may be appropriately considered here. In that case the public garbage contractor was given the right, under one clause inserted in his con-

tract, "to collect daily, including Sundays, for a period of five years, beginning December 1, 1900, from every part of the District of Columbia all dead animals, and remove them to convenient hauling distance as may be approved by the Commissioners of the District." It will be observed that no time limit was prescribed for the owner, and by the agreed statement of facts in the case the carcass sought to be removed had not become a nuisance or injurious to health or offensive to the senses of sight or smell. Judge Shepard opens his opinion with the words (p. 137):

> "There can be no more important field for the exercise of the activity of the ordinary police powers of government than the preservation of the public health, and it is within the unquestioned power of the municipal authorities to enact regulations looking to the *speedy and innocuous removal of the carcasses of all animals that may die within the limits of their jurisdiction, the decomposition of which would not only endanger the public health but also create a serious nuisance of another kind.*"

The court held this power to be not unlimited, however, and decided that the conviction of the defendant was improper, saying (p. 140):

> "The owner of an animal dying within the city limits, is entitled to a reasonable opportunity to exercise his unextinguished right of property in the carcass, and a police regulation which denies it to him is without foundation. Under conditions that may prevail or dangers that may be apprehended, the time allowed may be very brief, but some reasonable time under all the circumstances must be accorded."

After the decision of this case the owner of any dead animal was given *four* hours within which to remove it by the District authorities, where the death occurred on private premises, and only *one* hour where death occurred else-

where. (See section 9 of the Regulations of the Commissioners, quoted in *Dupont v. District of Columbia*, 20 App. Cas. (D. C.), 477.) Though these time limits are considerably shorter than that prescribed in the San Francisco order No. 2965, they have never been claimed to be unreasonable.

In concluding the opinion in the *Campbell* case the court uses words which, as we shall soon see, have an important bearing upon the case now before this court (p. 140):

> "Most if not all of the cases cited in behalf of the defendant in error, arise out of *regulations and exclusive contracts for the disposition of garbage, and present conditions that do not appear in the case at bar. It may well be that from the nature of garbage, a different rule would apply;* but that phase of the question is not involved and we express no opinion upon it."

That phase of the question, as we shall hereafter find, was soon to come before the court, and in one of the best opinions of the many which uphold ordinances similar to the San Francisco orders an authoritative opinion upon it was expressed.

> *Dupont v. District of Columbia*, 20 App. Cas. (D. C.), 477.

Two important cases decided in the United States circuit court for the northern district of California uphold the constitutionality of proper "dead-animal contracts" and clearly state principles which sustain the validity of the orders of the board of supervisors of San Francisco upon which the Sanitary Reduction Works relies in this case, viz:

> *Alpers v. City and County of San Francisco*, 32 Fed. Rep., 503.
>
> *National Fertilizer Co. v. Lambert*, 48 Fed. Rep., 458.

In the *Alpers* case Mr. Justice Field, in enjoining any obstructions to the execution of the contract therein relied on, said (p. 505):

"There is no doubt that the contract between the plaintiff and the city and county of San Francisco is one within the competency of the municipality to make. It is within the power of all such bodies to provide for the health of their inhabitants by causing the removal from their limits of all dead animals not slain for human food, which otherwise would soon decay, and, by corrupting the air, engender disease. And provisions for such removal may be made by contract, as well as the performance of any other duty touching the health and comfort of the city, its authorities always preserving such control over the matter as to secure an observance of proper sanitary regulations."

The *Lambert* case throws light on the meaning of the words contained in both order No. 2965 and order No. 12 (second series), "and any dead animals, not otherwise provided for by contract or franchise heretofore granted," for the complainant in that case had been given, under an order passed by the board of supervisors of San Francisco on December 26, 1882, "the exclusive right and privilege" *for a period of twenty years*, "of removing from the city limits all carcasses of such dead animals not slain for human food, as shall not be removed and so disposed of as not in any manner to become a nuisance, within twelve hours next after the death of the same by the owner thereof" etc. It will be noticed that this contract had not expired when the orders here called in question were passed, nor when this suit was brought, though section 6 of order No. 2965 provides that, in case such contract should be forfeited by the parties holding it, the grantees under said order should immediately succeed to the rights so forfeited. In upholding the exclusive privilege claimed by complainant, Judge Hawley, who also wrote the opinion in the circuit court of appeals in the present case, said, in answer to the contention that the contract attempted to create a monopoly, and deprived persons of their property without due process of law (p. 461):

"It is the duty of every government, whether State or municipal, to pass laws or ordinances for preserving the public health, protecting the good order and peace of society and providing for the abatement of nuisances. Such laws, if they contain nothing more than the necessary restrictions and limitations for the accomplishment of such purposes, are not unconstitutional on the ground that they deprive persons of their property without due process of law. Quarantine regulations, for instance, materially interfere with the free and unobstructed use of private property, and for the time being restrain, to a certain extent, the liberty of individuals. Yet the health, safety and welfare of the community often demand their enforcement; and such laws have always been upheld as necessary police regulations. Several other instances might be cited where laws of a similar character are sustained, but the authorities are too numerous and the general principles of law too well settled, to require any extended reference or review. No person has an inalienable right to produce disease, or trade in that which is noxious, and in every community, large or small, some minor rights of individuals must be surrendered for the benefit, protection, health and general good of all."

Having thus examined the so-called dead-animal cases and demonstrated that the principles underlying all those decisions are in no respect violated by the San Francisco orders, we desire now to call particular attention to the following cases relating to garbage contracts and ordinances, which certainly indicate a remarkable unanimity of opinion on the main questions now before this court:

Walker v. Jameson, 140 Ind., 591; 37 N. E. Rep., 402; 28 L. R. A., 679; 49 Am. St. Rep., 222.

City of Grand Rapids v. De Vries, 123 Mich., 570; 82 N. W. Rep., 269.

Dupont v. District of Columbia, 20 App. Cas. (D. C.), 477.

People v. Gardner (Mich.), 100 N. W. Rep., 126.

State v. Orr, 68 Conn., 101, 110; 35 Atl. Rep., 770; 34 L. R. A., 279.
Ex parte Casinello, 62 Cal., 538.
Kilvington v. City of Superior, 83 Wis., 222, 226; 53 N. W. Rep., 487; 18 L. R. A., 45.

In the first of these cases Jameson was the holder by assignment of a contract with the city of Indianapolis, through its board of public works, under which he had the exclusive right and obligation to remove the garbage from the premises of all persons in said city, and to transport the same through the streets thereof to the crematory. The contract had been let to the lowest bidder. The contractor was given the right to collect the price fixed for removal from the householder who produced the garbage. The contract was first assailed on the ground that the provision for payment by the householder was an "assessment" against him or his property, but the court said that such provision had not for many reasons a single element of an assessment. The opinion continues (p. 595):

"No householder is required to have garbage removed or pay for its removal. Every householder may destroy all his garbage on his own premises, taking care not to create a nuisance in so doing. If he do not destroy all, he may reduce it to a minimum. This ordinance and contract simply provide that if he does produce garbage that has to be carted through the streets, the city or its agent, the contractor, shall do the work at his expense. * * * It is no more an assessment than is the provision of the ordinance fixing the rate of payment for gas or water, or street car fare, as authorized by section 59 of the city charter, or the numerous provisions of section 23, specifying that the common council may require things done by the parties, and, if not so done, have the city do them at their expense, as taking down dangerous buildings, removing snow from the walks, etc."

Proceeding to treat the question, the court lays down the broad principle that "it is within the general power of a government to preserve and promote the public welfare, even at the expense of private rights," and that "in the exercise of the police power the State is ordinarily to be governed only by considerations of the public welfare." And says (p. 598):

> "It resolves itself solely into a question of power, and not of mere reasonableness. We recognize the rule that a municipal corporation has no power to treat a thing as a nuisance which cannot be one, but it is equally well settled that it has the power to treat as a nuisance a thing that from its character, location and surroundings, may, or does become such. In doubtful cases where a thing may or may not be a nuisance, depending upon a variety of circumstances requiring judgment and discretion on the part of the town authorities in exercising their legislative functions under a general delegation of power like the one we are considering, their action, under such circumstances, would be conclusive of the question."

Beach on Public Corporations, vol. 2, sec. 995, is quoted to the effect that "a by-law of a city prohibiting any person not duly licensed by its authorities from removing the house dirt and offal from the city is not in restraint of trade, but reasonable and valid, on the ground that, in the interests of public health, a city is justified in providing for some general system for removing offensive substances from the streets by persons engaged by the city, and responsible for the work, at such times as they are directed to attend to it," and in *Dillon on Municipal Corporations* (sec. 369) similar regulations are declared valid. Many authorities are cited which hold that it is reasonable "to grant to one or more the exclusive right to remove the carcasses of dead animals and other offal of a city (*Vandine, petitioner*, 6 Pick., 187; 17 Am. Dec., 351; *Cooley's Constitutional Limitations*, 6th edition, 739;

Tiedeman's Police Power, 316; *Dillon Municipal Corporations*, secs. 141 & 142)."

The court sums up the entire matter in the sentence near the close of the opinion (p. 602):

> "In view of the great weight of authorities, we are of the opinion that the contract and ordinance assailed are both within the long-settled and clearly recognized lines of police power, which is as broad as the power of taxation, and being simply a sanitary regulation, they cannot be considered as in the nature of confiscation or an attempt to create a monopoly."

In *City of Grand Rapids v. De Vries* the defendant was convicted of violating an ordinance regulating the disposition of garbage. Grand Rapids owned its garbage crematory, of which its board of health had the management and control. Under the ordinance the board of health was authorized "to enter into a contract with any suitable person or persons for the purpose of furnishing proper vessels or tanks for the reception of garbage, offal and all other refuse matter, and for furnishing the necessary vehicles for collecting and removing the same in the manner directed by said board." The person with whom the board should make the contract was to receive a license, and the ordinance further provided that no license should "be issued to any other person, firm or corporation for the gathering of such garbage." The holder of the license received no compensation from the city, but had the right to make a charge for his services of not more than ten cents a week to each householder, or one dollar a week to each hotel, restaurant, or boarding-house. This exclusive right was given for a period of three years, with a provision for an extension of two years more. The defendant had been in the habit of gathering garbage for twelve years, and the evidence in this case showed that the garbage he collected did not have a bad

odor, and that it was taken home by him and fed to his hogs. He had applied for a license and been refused.

The court quoted the definition of the words "garbage" and "offal" contained in the ordinance as including "every refuse accumulation of animal, fruit, or vegetable matter, liquid or otherwise, that attends the preparation, use, cooking, dealing in, or storing of meat, fish, fowl, fruit, or vegetables," and said that "these matters, in and of themselves, are regarded as nuisances—that is, the ordinary and accepted meaning of the words "garbage" and "offal" is such refuse matters that in and of themselves are nuisances." The ordinance was "aimed only at refuse—that is, discarded worthless matter—matter unfit for food. The householder has perfect liberty, under the ordinance, to consume or to sell or give away all the leavings of his table or kitchen that are fit for food, but he is not supposed by the ordinance to have around his premises in open baskets, pans, pails, or heaps that which is known as "refuse." Matter of this character he is required to care for by depositing the same in water-tight vessels or tanks, and dispose of it in such a way that will not endanger the public health." The court held the ordinance to be reasonable and valid. The orders of the board of supervisors of the city and county of San Francisco relate to the same kind of discarded, worthless refuse matter and substances as the ordinance of Grand Rapids—"house refuse, butchers' offal, garbage, refuse, dirt, ashes, cinders, sludge, broken glass, crockery, tins, bones, rubbish, or other like matter, or any dead animals (not otherwise provided for by contract or franchise heretofore granted by the city and county), or putrid or stinking animal or vegetable matter, or fish, flesh, and food condemned by the board of health as unfit for human food." That such refuse substances as these are in and of themselves nuisances, and that such only are aimed at and included is evident, not only from the words taken as a whole and in their context, but from the fact that these substances are not to be

"dumped or deposited," but are to be delivered at the crematory of the sanitary reduction works, to "be cremated or destroyed or subjected to such disposition and treatment as will secure and effect a complete combustion of all gases and odors arising therefrom."

Perhaps the most instructive case of all, and the closest in its facts to the one now before this court, is *Dupont v. District of Columbia*, 20 App. Cas. (D. C.), 477. Under the District appropriation act of Congress of June 6, 1900 (31 Stats., 822, 830), the Commissioners were authorized to enter into a contract for the collection and disposition of garbage, miscellaneous refuse, ashes, and dead animals, under such regulations and specifications as they might establish, for a period not exceeding five years. Under this authority, the Commissioners thereafter entered into a contract with the Washington Fertilizer Company, which company, thereupon erected the necessary plant for the disposition of the collected garbage, its location and construction being approved by the Commissioners. Elaborate regulations were adopted by the Commissioners, some of which are here copied on account of their similarity to the provisions of the San Francisco orders:

> "SECTION 8. It shall be unlawful for any person to deposit, throw or place any garbage, dead animal, fish or refuse animal or vegetable matter on any avenue, alley, street or other public place in the District of Columbia, or into the Potomac river, or in any other waters in the said District."

In section 9 it is provided that the District contractor shall collect and remove "all garbage, dead animals, fish, and refuse animal and vegetable matter found within the District to some place to be designated or approved by the Commissioners of the District, and to dispose of the same through a reduction or consumption process, subject to the sanitary inspection and approval of said Commissioners," and further that "no other person or party, except the District contractor, his, their or its agents, shall carry, convey or

transport through the streets, alleys, or public places of the said District any garbage, dead animals, fish, or refuse animal or vegetable matter, and it shall be unlawful for any person to interefere in any manner with the collection and disposal of such materials or dead animals by the District contractor, his, their or its agents or employés." Then follows the proviso and exception above alluded to as to the removal by the owners of dead animals of the carcasses within a limited period of not exceeding four hours after death. Stringent provision appears at the close, that "all garbage, dead animals, night soil, miscellaneous refuse, and ashes must be within the digesting tanks, or within the furnace, or otherwise in process of actual disposal not later than six o'clock a. m. on the day following their receipt by the contractor," and that all garbage and other refuse must be completely reduced within 48 hours.

When arrested the defendant Dupont was hauling through the streets of Washington several cans of garbage which he had collected under a contract from the Riggs and National hotels, intending to take it to his farm in Maryland, and to feed part of it to his hogs, and use part in fertilizing his land. The cans in which his garbage was conveyed conformed to the regulations prescribed by the commissioners. It was admitted that the garbage was worth $5 to the defendant. Notwithstanding his claim that the regulations above quoted were arbitrary and unreasonable, and that their effect was to deprive him of his property without just compensation or due process of law, he was convicted and fined.

In upholding the conviction, Judge Shepard says:—

> "The plaintiff in error does not, of course, deny that the reasonable regulation of the disposition of daily accumulating garbage and miscellaneous refuse matter in the District is a subject within the police power of Congress, the execution of which it may delegate to the municipal authorities in general terms."

After a clear and exhaustive treatment of the principles involved in the case, in the course of which it is stated, among other things, that money value is not alone sufficient to remove the materials purchased "from the category of nuisances and settle their character as property", or "make a case of unreasonableness or oppression against the law and the regulations under consideration," the opinion concludes (p. 488):

> "For these reasons it is apparent that no hard and fast rule can be laid down for the government of all cases arising out of the frequent exercise of the police power. Each case must turn upon its own peculiar circumstances and conditions, and it is only when these clearly show that the regulations and restrictions imposed have no substantial relation to objects within the police power and therefore constitute a palpable invasion of private rights that the courts are justified in denying their obligations. In *Campbell v. District of Columbia, supra*, we were of the opinion that the regulation, as applied to the facts of that case, was of such character.
>
> "The distinction between the two cases is clear. The carcass was valuable, had undergone no decay whatever, and was promptly removed in a wagon of approved construction. The death of a horse is of comparatively infrequent occurrence, and not capable of producing constant, widespread apprehension of danger or discomfort.
>
> "Garbage, as we have seen, is necessarily composed largely of matter noisome even before its deposit in the receptacles provided for it, and other matter mingled with it must necessary partake of its offensive character. Moreover, it is a thing of almost hourly accumulation in every occupied house of a large city, and is therefore a constant menace to the health and comfort of thousands of people. These conditions amply justify the application of a different rule as regards its collection, removal and final disposition.
>
> "In reaching the conclusion that the regulation under the facts of this case is a valid exercise of the police power, we are not to be understood as holding

that all matter which may be laid aside, merely, in the preparation of dishes for the table is necessarily garbage, and therefore subject to the same regulation in all respects. We agree with the supreme court of Connecticut in the case before cited (State *v.* Orr) that there may be some things, as for example, meat trimmings, fruit and vegetable parings, and the like, that are capable of unobjectionable uses. These the owner could not be compelled to throw away, but might make any reasonable use of before they could become offensive. *But when such matter is mingled with garbage, it becomes likewise subject to public control, notwithstanding that in some instances, the owners might be able to dispose of it for a price to persons willing to handle and make use of it, in its unreduced state, as either animal food or manure.*"

No better statement of the case now before this court could be made. Under the San Francisco orders, the substances to which they apply have already been discarded and have passed from the premises of the householders or other persons producing the same, into other hands, or to the public streets, and even if some things unobjectionable in themselves may have been mingled with them, such substances must be delivered at the crematory of the Sanitary Reduction Works, there to be cremated or destroyed.

People v. Gardner (Mich.), 100 N. W. Rep., 126, is an important recent case in point. The ordinance for the violation of which the defendant was convicted, required the occupants of dwellings, hotels, etc., to provide suitable water-tight boxes in which all garbage and refuse matter should be placed, and provided that the city might enter into a contract for the disposition of such garbage. Such contractor was required to remove all garbage in accordance with certain expressed regulations, and all other persons were prohibited from carrying or transporting any garbage through the streets. Garbage was defined so as to include dead animals and condemned food found within the city. The defendant contended that the refuse which he had gathered from the

tables of hotels had a money value as food for swine, and that in transporting it he was acting for the purchasers thereof, and asserted that the ordinance was not only unreasonable, but was unconstitutional as an attempt to take private property without compensation.

After stating that similar ordinances had been upheld in *People v. Gordon*, 81 Mich., 570, and *Grand Rapids v. De Vries, supra*, the court said (p. 127):

> "In those cases, the question of whether there is a property right in refuse was not raised in the form in which it is here presented, although in the case last cited it was quite plainly implied that the common council, *in the exercise of the police power, had the right to treat as a nuisance all such refuse as is unfit for human food. The court may well take judicial notice that table refuse, when dumped into receptacles kept for that purpose, will speedily ferment, and emit noisome odors calculated to affect the public health. If, in providing against such a nuisance, the owner of such material suffers some slight loss, the inconvenience or loss is presumed to be compensated in the common benefit secured by regulation*" (Horr and Burns, Municipal Corp., § 220).

The Michigan court fully approved the *Dupont* case, saying that Judge Shepard "distinguished some of the cases cited by defendant's counsel, which hold that it is not competent to declare a dead animal to be a nuisance *immediately after death*, and adding that "the reasoning in Dupont's case commends itself to us, and we are disposed to follow it. Judgment affirmed."

State v. Orr, 68 Conn., 101, is another interesting case, but space will not permit an extended consideration. Attention is called to the provision of the ordinance that no deposit should be made "within the limits of the city of Bridgeport, or upon any wharf, or upon any vessel lying at any wharf, except by permit from the board of health," which closely resembles in one important particular the San Francisco

orders. The court held that the board of health might contract with a single person to collect and remove garbage from the entire city.

In this case the defendant claimed that the garbage was fresh, and that no evidence was given that any of it was sour or putrid, and therefore asked the trial court to instruct the jury that "the privilege of contracting to transport garbage is a liberty and property right, of which one cannot be deprived without due process of law, unless the jury find that such garbage at the time of its transportation is a nuisance and detrimental to health." But it was held that such instructions were properly refused, the court saying (p. 112):

> "It was a violation of the ordinance to collect and transport the kitchen refuse which was its subject, whether such of it as was being transported at the time of the act complained of was noxious or innoxious. It was enough that it was 'such refuse matter as accumulates in the preparation of food for the table.' There is so much of this kind of matter that is offensive and dangerous to the health of the community, that all may be properly made the subject of public supervision and control."

In *Ex parte Casinello*, 62 Cal., 538, the following order of the board of supervisors of the city and county of San Francisco, closely resembling a provision of the orders now called in question, was upheld by the supreme court of California:

> "No person shall throw into, or deposit upon any public street, highway or grounds, or upon any private premises, or anywhere, except in such a place as may be designated for that purpose by the superintendent of public streets and highways, *any glass, broken ware, dirt, rubbish, garbage or filth.*"

After quoting section 11 of article XI of the California constitution and the provisions of the act of the California legislature approved April 25, 1863, already given in full in this brief, and remarking that it is too plain to admit of con-

troversy that dirt, rubbish, garbage, and filth are nuisances, and that glass and broken ware can be easily converted into nuisances if thrown about promiscuously, the court concludes (p. 542):

> "The regulation in this case, instead of being arbitrary, unreasonable or unjust, was a wise and salutary one, calculated to promote the welfare and best interests of the city, and was in its nature and purpose, a salutary police regulation, designed to protect the safety and health of the inhabitants of the city of San Francisco."

The general question took a different phase in *Kilvington v. City of Superior*, 83 Wis., 222—whether a contract made by the city for the erection of a garbage crematory at a designated place was valid. The court held the contract binding on the city, saying that it was not at all necessary "that there should have been express power conferred on the village to build, or contract for building, the crematory. The village board might contract for it as a means adapted to the end of preventing or abating nuisances, and as a health measure, and so within the general purpose for which the village was organized."

The rights of the village are thus stated (p. 225):

> "It would hardly be questioned by any one that, if garbage, manure, or dead animals were found within the village, in the interest of good order, cleanliness and public health the board of trustees would have power to abate such nuisances by removing or otherwise making suitable disposition of them. *To this end it might provide for destroying them* instead of fouling the waters of a lake or stream of water with them, to be again cast up, to the prejudice of the public, or *depositing them where they would create a new nuisance.* To this end, if a garbage crematory becomes necessary, the board may within a fair and *bona fide* exercise of their discretion, contract for its construction, and the village will be bound by the contract."

While in no one of the foregoing cases which have been considered were the facts exactly like those connected with the San Francisco orders now before this court, every question affecting the validity of these orders has been somewhere raised and after careful consideration decided in their favor. We have, moreover, found no case which holds any order similar to them invalid. To make this conclusion entirely plain and indisputable, we will very briefly, by way of final summary, answer the various objections which have been or can be urged against the orders.

A.

The orders are not invalid because they confer an exclusive privilege or right.

In *Slaughter House Cases*, 16 Wall., 36, Mr. Justice Miller said (p. 66):

> "It may be safely affirmed that the Parliament of Great Britain, representing the people in their legislative functions, and the legislative bodies of this country, have from time immemorial to the present day continued to grant to persons and corporations exclusive privileges,—privileges denied to other citizens,—privileges which come within any just definition of the word monopoly, as much as those now under consideration; and that the power to do this has never been questioned or denied. Nor can it be truthfully denied that some of the most useful and beneficial enterprises set on foot for the general good have been made successful by means of these exclusive rights, and could only have been conducted to success in that way."

The changing of a very few words in two sentences in the opinion of Mr. Justice Miller shows how that great decision is entirely applicable to the case now before this court. The sentences are (p. 61):

"That the landing of live stock in large droves, from steamboats on the bank of a river, and from railroad trains, should, for the safety and comfort of the people, and the care of the animals, be limited to proper places, and those not numerous, it needs no argument to prove. Nor can it be injurious to the general community that while the duty of making ample preparation for this is imposed upon a few men, or upon a corporation, they should, to enable them to do it successfully, have the exclusive right of providing such landing places, and receiving a fair compensation for the services."

Making the slight changes, we have:

"That the garbage and other refuse substances daily accumulated and collected in a large city, should for the safety and the comfort of the people, and the protection of the public health, not be dumped or deposited at will by those producing or collecting the same, but should be cremated or otherwise destroyed at some proper places, and those not numerous, it needs no argument to prove. Nor can it be injurious to the general community that, while the duty of making ample preparation for this is imposed upon a few men, or a corporation, they should, to enable them to do it successfully, have the exclusive right of providing such crematories or places of reduction, and receiving a fair compensation for the same."

Upon the Sanitary Reduction Works was imposed the duty of making preparation for cremating and otherwise destroying the accumulated garbage, and the necessity of expending in that behalf upwards of $180,000. The exclusive right of providing the crematories and the privilege of charging a fair compensation for cremating the garbage were therefore entirely just, and were necessary to enable that corporation to do the work successfully.

Exclusive garbage contracts were upheld in the following cases already commented upon at length:

City of Grand Rapids v. De Vries, 123 Mich., 570.
Walker v. Jameson, 140 Ind., 591.
Dupont v. District of Columbia, 20 App. Cas. (D. C.), 477.
Smiley v. McDonald, 42 Neb., 5.
Coombs v. McDonald, 43 Neb., 632.
People v. Gardner (Mich.), 100 N. W. Rep., 126.
State v. Payssan, 47 La. Ann., 1079.

Many passages from the above cases on this point have already been quoted, as well as one from *Iler v. Bass*, 64 Neb., 710.

And exclusive dead-animal contracts have been upheld in the following cases:

Alpers v. City and County of San Francisco, 12 [illegible] Rep., 503.
National Fertilizer Co. v. Lambert, 43 Fed. Rep., 431.
City of Louisville v. Wible, 84 Ky., 293.

In *State v. Orr*, 68 Conn., 101, 110, the court held that the board of health "might contract with a single person to collect and remove garbage from the entire city, or with several persons to collect and remove it from as many different portions of the city. It might also make such contracts with respect to parts of the city, or to certain buildings in parts of the city, and lease the collection and removal of garbage from other places open to those who obtain from its clerk a proper permit, and provided proper means of transportation. *By neither method of procedure would any monopoly be created by which the common right of citizenship would be infringed upon.*"

See also *Vandine, petitioner*, 6 Pick., 187.

In *City of Louisville v. Wible, supra*, the court said (p. 295):

> "The State, however, *and its municipalities*, entrusted with the execution of this power, may provide the means of protecting the public health. It is its duty to do so, and any means may be adopted that will effect the end, such as employing competent and trusty persons to take the matter in charge, under the supervision and control of the State or city."

In *Bancroft v. Thayer*, 5 Sawy., 502, 505, Fed. Cas. No. 835, it was even held that a State may provide by legislation that a designated person should have the exclusive privilege of furnishing all the text books needed for use in the public schools, the court saying:

> "To authorize or provide that by means of contract or legislative grant, a particular person * * * *shall have the exclusive right to do or furnish a particular thing upon certain conditions for the use or convenience of the public, has always been a common mode of exercising the police power of the State.*"

This principle has been repeatedly affirmed in the decisions upholding what are known as the uniform text-book laws.

Dickinson v. Cunningham (1904, Ala.), 37 So. Rep., 345.
Lupes v. State (1899), 103 Tenn., 500; 53 S. W. Rep., 962; 48 L. R. A., 167 (citing numerous cases).
Cooley's Constitutional Limitations (5th ed.), 225, note 1.

These cases have been decided under constitutions with very stringent provisions against monopolies and show that such exclusive privileges granted under the police power of the State or the city are not monopolies within the meaning of such prohibition nor of the law.

B.

The orders are not invalid as taking private property without compensation.

In the brief presented on the application for the writ of certiorari a few words of the bill of complaint filed by the Sanitary Reduction Works in the circuit court were italicized, to the effect that portions of all of the garbage "are of value as articles of commerce," but the words immediately following were left in plain, ordinary letters, being "*after being treated and reduced by your orator by processes both of reduction and incineration.*" There is no admission in this sentence that refuse materials had such value at the time they were cast off and gathered by the scavengers. Moreover, the evidence shows that the works had only been used as a crematory; that they had not been equipped with machinery for reducing the garbage, and that the company had obtained no by-products whatever from the garbage (Rec., p. 112). That the company has the right to construct machinery in order to reduce the garbage and derive profit from these by-products whenever it deems it wise to do so, cannot be questioned, but to gain this profit it will be required to incur considerable additional outlay and expense.

With this passing allusion to a part of petitioner's brief which might lead to a misunderstanding of the facts in this case we cite, without further comment, the following cases which hold that such orders as those now under consideration do not violate any property rights of the citizen:

People v. Gardner (Mich.), 100 N. W., 126.

Dupont v. District of Columbia, 40 App. Cas. (D. C.), 477.

National Fertilizer Co. v. Lambert, 48 Fed., 458.

State v. Orr, 68 Conn., 101.

Harrington v. City of Providence, 20 R. I., 235.

Baker v. Brown, 12 Pick., 183, 193.

And also the following celebrated cases in this court:

Lawton v. Steele, 152 U. S., 133, 136.
Mugler v. Kansas, 123 U. S., 623, 661.
Powell v. Pennsylvania, 127 U. S., 678, 685.
Barbier v. Connolly, 113 U. S., 27.

In *Mugler v. Kansas*, *supra*, at page 669, this court says:

> "The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals or the safety of the public is not,—and consistently with the existence and safety of organized society cannot be,—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property to inflict injury upon the community. The exercise of the police power *by the destruction of property which is itself a public nuisance*, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner."

In *Chicago, Burlington & Quincy R. R. Co. v. Chicago*, 166 U. S., 226, 255, this court said that the city could not be required "to compensate the defendant for obeying lawful regulations for the safety of the lives and property of the people," prescribed under the police power vested in it.

In the brief for petitioners some reference is made to certain articles mentioned in the San Francisco orders—for example, ashes and bones—as possessing value and not being nuisances *per se*. While the testimony in the circuit court was to the effect that the Sanitary Reduction Works did not insist on ashes being brought to the crematory (Rec., p. 116), yet, without regard to this fact, these articles are mingled with the discarded garbage and refuse substances which

are collected from the San Francisco householders, and under the decisions, already many times alluded to, of *State v. Orr* and *Dupont v. District of Columbia*, "they likewise become subject to public control." Many of the ordinances include ashes in the list of refuse matter (see, for example, the Jameson and Dupont cases), and it will be time enough to declare the orders inapplicable to substances which may be shown not to be nuisances in themselves, or likely to become such, when some person is improperly arrested for violating them. No such case has been made by petitioners in the matter now before this court.

C.

The orders do not in any respect interfere with the occupation of scavengers.

As Judge Hawley said in his opinion in the circuit court of appeals, 126 Fed. Rep., at page 40, in showing that the case of *Iler v. Ross*, *supra*, does not apply to these orders:

> "As a matter of fact, the scavengers in this case are not enjoined from entering upon private property and removing filth and garbage therefrom. The object sought to be accomplished in this suit is to enjoin appellants from diverting from the crematory of appellee in the city and county of San Francisco the garbage, waste and refuse within the city, *which the scavengers collect in the prosecution of their business. This does not deprive them of the right to collect the garbage, but does prevent them from interfering with the right given by the city to dispose of it in any other way than by dumping or delivering it at appellee's crematory.*"

Even if the company holding the exclusive contract to dispose of the garbage had also the sole right to collect it, the orders would not be invalid. We have seen that in a large number of the garbage cases already referred to it

length the contract included the collection of the garbage from the premises of the householders, hotels, etc. In *City of Grand Rapids v. De Vries*, 123 Mich., 570, the court said (p. 583):

> "The respondent asserts that the ordinance does not license or control, but prohibits, what he denominates a lawful and proper business. The business of handling and carting garbage through the public streets of a city is a business which a municipality may regulate for the benefit of the public health. * * * It is not the creation of a monopoly when the city from year to year licenses one or more persons to cart such garbage from and out of the city, specifying the manner in which it shall be done."

Citing to the same effect *Rendering Co. v. Behr*, 7 Mo. App., 345, the court also says (p. 582):

> "The gathering of garbage is not a trade, business or occupation in any proper sense, and such employment does not come under the doctrine in reference to monopolies or in reference to legislation in restraint of trade. It is a matter in which the public agencies are authorized to pursue the best means to protect the public health."

D.

The charge authorized to be made upon those delivering the garbage does not make the orders invalid.

It was claimed that a few of the scavengers enjoined by the circuit court were householders. This really is of no consequence. Such charges are not illegal and have frequently been upheld. The charges sustained in the Slaughter House cases, *supra*, rest on exactly the same principles. Mr. Justice Miller pointed out the only objection which can be properly made to them in the sentence, "The prices or charges to be made by the com-

pany are limited by the statute, *and we are not advised that they are on the whole exorbitant or unjust.*" It may be noted that the charge which the rival company, one of the petitioners for the writ in this case, was entitled to make under its contract was only two cents less per load than the charge authorized by the orders, though such company had not, at great expense, erected a crematory, nor did it intend to destroy the garbage. In the Grand Rapids case, section 5 of the ordinance contained the following:

> "Provided, however, that patrons so furnishing garbage as aforesaid shall not be subjected to a weekly charge of more than ten cents for each household, and not more than one dollar a week for each hotel, restaurant or boarding-house."

In *Raymond v. Fish*, 51 Conn., 80, 96; 50 Am. Rep., 3, the person who placed the filth was to pay for its removal, if he was known; otherwise, the town. In *King v. Davenport*, 98 Ill., 305; 38 Am. Rep., 89, an ordinance was upheld which provided that if the city caused the removal of a condemned building within the fire limits the expense of the removal might be recovered from the offender.

In *Waller v. Jameson*, 140 Ind., 591, the provision for payment by the householder was expressly upheld, and the fact that upon a petition for rehearing it was said that the right of appellee in that case to recover "did not depend upon the liability of the citizen to pay for the removal of his garbage" does not in any way weaken the strength of the arguments in the main opinion. In the case now before this court, as in the Jameson one, no refusal of a householder to pay the charge is asserted, and it may with equal propriety be said that it will be time enough to consider such a question "when it arises," as the Indiana opinion on rehearing puts it, "between the respondent company" and the citizen in an action to recover for the "cremation" of such garbage.

The right to make a reasonable charge was also upheld

in *Meyer v. Jones*, 20 Ky. Law Rep., 1632; 49 S. W. Rep., 809 (passage quoted *supra*).

See also, on this point, *Smiley v. McDonald*, 42 Neb., 5, and *Dupont v. District of Columbia*, 20 App. Cas. (D. C.), 477, and *People v. Gardner* (Mich.), 100 N. W. Rep., 126, the ordinances considered in all of these cases having provided for such charges.

These charges are precisely similar in principle to the inspection fees which are so common. In *Willis v. Standard Oil Co.*, 50 Minn., 290; 52 N. W. Rep., 652, the fees for inspecting illuminating oils were attacked, but the court upheld them, saying (p. 297):

> "It is also objected that the act is one levying a tax, and not a police regulation. * * * That the State may make any business requiring police regulation pay the expense of regulating and controlling it, and that this may be done by exacting fees, license fees, or inspection fees, *from those engaged in the business*, no one disputes. On its face, this law is a *bona fide* police regulation, a proper inspection law, and the fees are in good faith exacted to reimburse the State in the expense of inspection and forcing observance of the law."

What real difference in principle is there between such a case and the case of a public contractor or agent whom the State or municipality has employed and authorized to put up an expensive building and plant, and then to make a reasonable charge upon those who produce or deliver the garbage for the creation and destruction of the same?

See, also—

City of Norfolk v. Flynn (1903), 101 Va., 473; 44 S. E. Rep., 717; 99 Am. St. Rep., 918.

Morgan's Steamship Co. v. Board of Health of Louisiana, 118 U. S., 455.

E.

The term of fifty years was within the discretion of the municipality to grant.

On this point the learned judge who wrote the opinion in the circuit court of appeals well says (126 Fed. Rep., at page 38; Rec., p. 418):

> "The question as to the reasonableness of granting the exclusive franchise for fifty years is one upon which there may be honest differences of opinion. Courts cannot, in the determination of this question, run a race of opinion upon points of reason and expediency with the law-making power. No iron-clad rule can be laid down to determine where the discretion of the board ceases, and where the power and authority of the court to declare the action of the board unreasonable begins. The border line must be ascertained by the facts, conditions and circumstances surrounding the subject-matter in every particular case. The board in the present case exercised its best judgment in passing order No. 2965 and included therein such terms and conditions as it deemed necessary for the protection of the public health, safety and welfare. It was authorized by the laws of the State to make the contract in question. It was required to act with sound discretion as to the methods and terms. With the honest and reasonable exercise of this authority, a court has no right to interfere, although the board may not have chosen the best method or made the most advantageous contract in relation to the subject-matter. It is only in cases where it clearly appears that the board has exceeded its authority, or acted arbitrarily, oppressively and unjustly in the exercise of its discretion, that a court is called upon to act. When we take into consideration, as we must, the large expense to be incurred by appellee in the building of its crematory, and the protection and benefit to be derived by the city and its inhabitants, we are unwilling to say that the term of fifty years for the life

> of the contract is so unreasonable as to authorize, warrant or justify us, in the light of all the authorities and of all the facts, to declare the order void."

In the *Slaughter House Cases* the duration of the privilege granted was twenty-five years, in the *Alpers* case twenty years, in *Smiley v. McDonald* ten years, and in the *Dupont* case five years, in all these cases the privilege being an exclusive one. In this connection attention is called to the fact that the grantee under order No. 2965 not only paid a cash sum of $2,510 for this franchise, but also agreed to pay to the city and county of San Francisco 2 per cent. of the gross receipts for the first fifteen years and 5 per cent. for the remaining thirty-five years, and also bore the entire expense of the construction of the crematory. The city of Grand Rapids built and owned its own crematory. As Judge Hawley says, there is certainly nothing disclosed by the evidence in this case which will authorize a court to declare the orders void because of the term of the franchise or privilege conferred by it.

F.

A municipality has the same right to exercise the police power in matters within its jurisdiction as the State.

On page 14 of the brief presented by the petitioners for the writ of certiorari it is said of the *Slaughter House Cases*:

> "The law-making power in that case was the sovereign law-making authority of the State of Louisiana, while here we have a mere municipal corporation which has only such authority as is delegated to it by a sovereign law-making power."

It is needless to say that no such distinction can be made to apply to the case now before this court. We quoted at

the very beginning of our discussion the provisions of the constitution of California and the law of 1863 which confer ample power on the city and county of San Francisco to pass the orders now under consideration. In this matter of health there is, therefore, no difference between the powers of the State and the municipality. Mr. Justice Miller claims the two together near the beginning of his opinion in the *Slaughter House Cases:*

> "It is not, and cannot be successfully controverted that it is both the right and the duty of the legislative body, *the supreme power of the State or municipality*, to prescribe" etc.

In *City of Louisville v. Wible*, 84 Ky., 290, 295, it is said that "the State and its municipalities entrusted with the execution of this power may provide the means of protecting the public health." Besides, nearly every one of the numerous garbage and other cases which we have so carefully considered were concerned with the ordinances of municipalities.

See also, besides these:

Barbier v. Connolly, 113 U. S., 27.
Yick Wo v. Hopkins, 118 U. S., 370.
Ex parte Lacey, 108 Cal., 326.
Ex parte Tuttle, 91 Cal., 589.
Ex parte Schraeder, 33 Cal., 279, 284.

It may then be safely asserted that the legislative body of the city and county of San Francisco—that is, its board of supervisors—had the right under its police power to make all the provisions for the protection of the public health which the State of California or any sovereign State could make, and the same rules will determine the validity of the orders herein called in question as would be applied to the legislative acts of a State. Tested in this way, the validity of the orders numbered 2965 and 12 (second series) cannot be doubted.

MUNICIPAL QUESTIONS.

Certain questions were raised and argued in the brief filed by petitioners in support of their application for the writ of certiorari, which, in the light of the principles regulating the exercise of the police power by the legislative body of a municipality, as clearly explained in the cases which have been already considered at length, do not seem of sufficient importance to merit extended notice. We feel confident that the case now before this court will be decided here on the same broad grounds as in the lower courts. We shall, therefore, devote only a brief space to pointing out the weakness of these arguments as urged against the San Francisco orders.

In the first place, it is evident that, even if possessed of strength, these objections could not be made at this time or in this action. Thompson on Corporations, section 5340, declares:

> "But on the other hand, when a party other than the State, seeks to establish rights against a corporation, and it defends against the action on the ground of its being possessed of certain franchises with which the action is compatible, it is sufficient that it appears that it is *in fact in possession of the franchises claimed. Whether or not it is rightfully in possession of them is a question which can only be determined in a proceeding in which some person or corporation who claims a better title is a party*" (citing *Weaverville, etc., R. Co. v. Supervisors*, 64 Cal., 69, 71).

The case of *City of Zanesville v. Zanesville Gaslight Co.*, 47 Ohio, 1, from which the entirely misleading syllabus is quoted in petitioners' brief, has not the remotest bearing on the matter now before this court.

While the San Francisco board of supervisors assumed to act under the California act of March 23, 1893 (Statutes of Cal. 1893, page 288), it was not necessary for them to do so.

Even if that act had never been enacted by the California legislature, the board of supervisors might, with perfect propriety and entire legality, have proceeded under the police power vested in them to call for bids in the same manner as they advertised. It was their duty to make every effort to obtain an advantageous offer for the city and to make as good a contract as possible.

Still, considered as a franchise or privilege granted under the act of 1893, the right to cremate the garbage would be valid. It is true that in *Thompson v. Board of Supervisors*, 111 Cal., 553, as a result of a direct action in mandamus by one of the rival bidders for an electric railroad franchise the supreme court of California held that the law of 1893 compelled the award to the highest cash bidder. The petitioners are, however, as we have already seen, in no position to avail themselves of this objection. The defeated bidder, Merle, did contest the validity of the award to Sharon, to whose rights the Sanitary Reduction Works succeeded, but Merle was defeated (Rec., pp. 367, 368), and he did not appeal. In any event, it is evident that the city was the gainer by the acceptance of the Sharon bid, since in three years of the term of the franchise the 2 per cent. of the gross receipts makes up the cash difference between the two bids (Rec., pp. 114, 332). The California Reduction Company, one of the petitioners herein, organized in the fall of 1898 (more than two years after order No. 2965 was passed), certainly had no rights in the matter of the granting of this privilege. The Sharon privilege was adjudged valid in a suit in which the City and County of San Francisco was a party, and said city and county has been benefited by its yearly percentage of receipts ever since. It could not now assail the franchise if it would and would not if it could. Moreover, it became so evident that the rule laid down in the Thompson case was an unwise one that the State legislature changed the law on March 13, 1897, and provided that all bids for a franchise "must be for the payment in lawful money of the

United States of a stated per cent. of the gross annual receipts" (Cal. Stats., 1897, p. 135).

Acting upon the contract contained in order No. 2965, and in accordance with its terms and conditions, the Sanitary Reduction Works erected its plant at an expense of $180,000. It is in no respect material at this time, nor was it at the time this action was commenced, whether order No. 2965 was presented to the mayor for his approval or not. The record is silent in regard to this fact. For aught that appears therein, the order may have been presented to the mayor and not have been acted upon by him for ten days. In any event, order No. 12 (second series), which recited that all the terms and conditions of the former order had been complied with by the Sanitary Reduction Works, and expressly ratified and confirmed it, was unanimously passed by the board of supervisors and approved by Mayor James D. Phelan. The board of supervisors accepted the percentage of gross receipts, as fixed by the order for fourteen months before the action was commenced in the circuit court, and would not now be permitted to deny the validity of either order. As pointed out above, the petitioners for the writ of certiorari had not expended a dollar, or taken any action whatever, until after the passage of the second order.

The contracts of a corporation, whether municipal or private, stand on the same footing with contracts of natural persons and depend on the same circumstances for their validity and effect.

Argenti v. San Francisco, 16 Cal., 255.
Chapman v. County of Douglas, 107 U. S., 318, 357.
Clark v. Washington, 12 Wheat., 40.

The contract contained in order No. 2965, or the privilege or franchise conferred under it, was thus expressly ratified and confirmed by order No. 12 (second series). The crematory of the Sanitary Reduction Works was accepted by the second

order, and the recital was made therein that the terms and conditions of order No. 2965 had been fully complied with.

See *McQuillin*, Municipal Ordinances, section 164; also *Shilo*, St. 165, Pa. St., 386; 30 Atl. Rep., 986, and authorities cited.

But there are the best of reasons and strongest of authorities for holding that it was unnecessary to present order No. 2965 to the mayor for his action. In a recent case, that of *Mayor, etc., of Jersey City v. Town of Harrison* (N. J. L.), 58 Atl. Rep., 100, it is said (p. 101):

> "It must be conceded that where the legislature has authorized a municipality to act or contract, and does not require this to be done by ordinance, the legislative body of the municipality may contract by a vote upon a motion, or by the passage of a resolution."

Under the act of April 25, 1863, power was given to the board of supervisors of the city and county of San Francisco "by regulations or order * * * second * * * to make all regulations which may be necessary or expedient for the preservation of the public health and the prevention of contagious diseases, to provide by regulation for the prevention and summary removal of all nuisances" (Cal. Stats. 1863, p. 540).

That there is a difference between order or regulation and ordinance is evident from the use of the words in this act. For example, in division "seventh" it is plainly by an order not requiring presentation to the mayor that the board is given power "to designate one of their number who shall, in the absence of the mayor or *during his inability from any cause*, perform the duties required by law of the mayor." This distinction is also recognized in *People v. Counts*, 89 Cal., 15, wherein, in answer to the claim that the board should have proceeded by ordinance and not by order, the court said (p. 22):

"Conceding that the county government act for some purposes requires an *ordinance*, whilst for other purposes only an order is required, it is only necessary, in answer to this objection, to say that for the purpose under consideration section 37 of the act (Stats. 1883, p. 311, c. 75) requires the board to do what it is thereby required to do 'by order.'"

See also *McQuillin*, Municipal Ordinances, sec. 6.

Kilvington v. City of Superior, 83 Wis., 222.

Napa v. Eastoby, 76 Cal., 222, 228.

People v. Linder, 107 Cal., 94.

Fairchild v. City of St. Paul, 46 Minn., 540.

It will be noticed that only a contract clearly within the police power of the city is made by order No. 2965. Order No. 12 (second series), containing also a penalty for the violation thereof, was presented to the mayor for his action.

If order No. 2965 is to be considered as granting a privilege or franchise under the law of 1893, heretofore mentioned, then no action of the mayor was required, as it is definitely provided therein that "on the day so stated, the board or other governing or legislative body herein mentioned, must meet in open session and read the tenders. The franchise or privilege must then be awarded to the highest bidder" (Stats. Cal. 1893, p. 288). Certainly no opportunity was therein given for presentation to the mayor.

See *People v. Board of Supervisors*, 122 Cal., 421.

Eisenhuth v. Ackerson, 105 Cal., 47, referred to by opposing counsel, was a case of the granting of an electric railway franchise which was vetoed by the mayor, but this case has no application to the one before the court, for the reason that it does not arise under the act of 1893.

The police power of a municipality rests in its legislative body (*Slaughter House Cases*, 16 Wall., 36). The "legislative authority" of the city and county of San Francisco is vested in the board of supervisors thereof.

Harrison v. Roberts (1904, Cal.), 78 Pac. Rep., 537, 540.

It was held in this recent case that proposals for amendments to the charter need not be concurred in by the mayor or presented to him for his approval. Before the adoption of the present city charter it was held in *McDonald v. Dodge*, 97 Cal., 112, 114, that the board of supervisors of San Francisco is the body which forms the legislative department of the government of the city, the court saying: "It is true that the mayor, by virtue of his right of veto in certain cases, has some of the law-making power of the municipality; but the charter of the city" [this was the consolidation act in existence at the time order No. 2965 was passed] "does not make him a part of the 'legislative department,' in the sense that no independent power is or can be given to the latter." In the leading case of *Jacobs v. Board of Supervisors*, 100 Cal., 122, it was held that the constitutional provision for the fixing of water rates by the board of supervisors, or other governing body of the city and county, did not require the ordinance fixing such rates to be presented to the mayor of San Francisco for his approval. In *Truman v. Board of Supervisors*, 110 Cal., 128, it was held that the Board of Supervisors had power to fix the rate of taxation and that the mayor had no veto of their action in that matter. (See also *Brooks v. Fisher*, 79 Cal., 173.) As Chief Justice Beatty well says in the Jacobs case, "The board of supervisors of San Francisco is the legislative body as to all subjects of legislation, with a few specified exceptions; and its acts do not generally require the approval of the mayor."

The claim made that the franchise relied on in this case never took effect because of the words "from and after the approval of this order," seems entirely frivolous in view of section 13 of the order, viz: "This order shall take effect and be in force on and from its passage." It was certainly passed by the board February 17, 1896.

It is perfectly clear, then, that if order No. 2965 was in terms a regulation and in effect, as we may properly claim, a contract, which the board of supervisors of the city and

county of San Francisco had the right to make under the police power, it was not necessary that the order should be presented to the mayor, as he is no part of the legislative body of the municipality.

If order No. 2965 constitutes a grant and sale of a franchise under the law of 1893, no provision is made in such law for any presentation to or approval by the mayor, and such presentation would be clearly incompatible with its terms or plan. And even if it could be held upon any possible theory that order No. 2965 was invalid because it does not affirmatively appear in the record that it was approved by the mayor, still the full compliance with its terms and conditions by the Sanitary Reduction Works, the subsequent acceptance of its plant by the city and county of San Francisco, under order No. 12 (second series), unanimously passed by the board of supervisors and approved by Mayor Phelan, ratifying and confirming, as such later order does, the terms and contract contained in the former and the payment by the company and the acceptance by the city and county of the specified percentage of gross receipts, make the contract by the city and county and the rights conferred under such orders beyond any question valid and binding.

In conclusion, we desire to call particular attention to the able opinions presented in this case in the circuit court and in the circuit court of appeals and covering all phases of the matters under consideration (94 Fed. Rep., 693, and 126 Fed. Rep., 29; Rec., pp. 88, 409). The judges of these courts were all familiar with the local and municipal questions involved, and their line of argument and reasoning is on this account peculiarly valuable. Above all, we desire again to emphasize the fact that the only essential question to be determined is whether the San Francisco orders numbered 2965 and 12 (second series) constituted a valid exercise of the police power vested in that municipality. We submit that the cases which we have cited and at length considered in this brief are unanimous in holding that orders and regulations

of such character are wise and salutary, reasonable and proper, legal and constitutional; that they are in fact necessary for the preservation of the public health and the protection of the public interests.

The decree of the circuit court of appeals should be affirmed.

C. L. TILDEN,
SHELDON G. KELLOGG,
ALDIS B. BROWNE,
ALEXANDER BRITTON,
Counsel for Respondent.

ADDENDA.

Since preparing the foregoing brief, counsel for respondent have noted two later decisions upon the main questions involved in this case—one rendered by the supreme judicial court of Maine on April 14, 1905, and the other by the supreme court of California on July 13, 1905, as follows:

State vs. Robb, 60 Atl. Rep., 874.
In re Zhizhuzza, 81 Pac. Rep., 955.

These decisions are in entire harmony with the various authorities cited and considered at length in the brief. In the first case one William F. Robb was charged with unlawfully going "about collecting certain house offal, consisting of animal and vegetable substances, the said Robb not being then and there duly authorized and appointed thereto according to law," nor the deputy of any person so authorized and appointed. The ordinance of the city of Portland, upheld in this case, provided that "all house offal, whether consisting of animal or vegetable substances, shall be deposited in convenient vessels, and be kept in some convenient place, to be taken away by such person or persons as shall be appointed by the sanitary committee for that purpose." All persons were required to deliver promptly to the person so appointed "the offal accumulated on their premises," and were subjected to a fine for neglecting "to provide suitable vessels for the deposit of house offal," or for hindering or delaying in any way "the person so appointed to receive it, in the performance of his duties." The ordinance further provided, under penalty of a fine, that "no person shall go about collecting any house offal, consisting of animal or vegetable substances, or carry the same through any of the streets, lanes or courts of the city, except the person appointed as aforesaid, or his deputy."

The party charged with violating this ordinance had removed from certain hotels in Portland, of which he was the proprietor, refuse food and discarded victuals, and had also purchased and collected from two other establishments in the same city swill, consisting of refuse from the table, including bread, meat, vegetables, and broken victuals, though none were in a decayed condition, and had carried such offal and swill to his home in South Portland, where he had used it all in feeding his hogs and hens. He removed these substances in covered barrels, under proper sanitary arrangements, and in a workmanlike manner. Mr. Robb paid $100 a year for the swill which he purchased and collected from the two establishments. He had no license to perform this work from the city of Portland, which had, on the contrary, through the appointment by its sanitary committee in conformity with the ordinance, a regularly authorized scavenger. The ordinance had been clearly violated, but it was claimed to be unconstitutional, in that it was in restraint of trade, created a monopoly, and constituted an unwarrantable interference with the rights of the owners of private property.

After citing many well-known cases to the effect that "reasonable municipal health regulations, under the authority of the State, are not void as taking private property without due process of law, or as a taking of private property without due compensation," and that the fact that house offal has some appreciable value "does not save it from police regulation, if it is already noxious, or is in such condition as to require prompt intervention to prevent its becoming noxious and dangerous to health," the court sums up the matter in the following paragraph (p. 879):

"Upon a review of all the authorities, we conclude that the rule most consonant with authority, as well as with reason, is that a city, in the exercise of the police power granted to it by the State, may, by reasonable ordinance, regulate the collection and disposal of substances within the city,

which are of such a condition and of such a character as to be nuisances *per se* and deleterious to the public health or comfort, or which are liable to become nuisances and noxious and deleterious, unless immediate care is taken to prevent their becoming so. *We think that a city may prevent conditions injurious to health, as well as abate them. It does not create an unlawful monopoly or unlawfully restrain trade to commit the business of collecting and disposing of such substances to one person, and to exclude all others from such business.*"

The California case, *In re Zhizhuzza*, 81 Pac. Rep., 955, presents some novel features, but was decided on the same broad principles of the police power, which have been uniformly held to be applicable to these matters. The petitioner was a scavenger in the city of Oakland, and was convicted of gathering and removing garbage in violation of an ordinance of that city. This ordinance provided that "the city of Oakland, its duly authorized agents, servants or employees, shall have the exclusive right to gather and collect garbage within said city, and it shall be unlawful for any person, firm or corporation, except as otherwise provided in this ordinance, to collect or gather garbage within said city." The terms "garbage," "waste matter," "ashes," and "night soil" were defined separately, and together include considerably more than is covered by the San Francisco orders which form the basis of the case now before this court. The ordinance further provided that "all garbage accumulated at any private dwelling house or residence shall be removed by the city of Oakland, its agents, servants or employees, at regular intervals * * * and must be taken to the city garbage crematory, or such other crematory as may be hereafter legally established in said city, and must forthwith be consumed and incinerated therein to an odorless ash, and the city of Oakland, its agents, servants or employees, shall remove all ashes and waste matter. For such services, the occupant, tenant or lessee of each house or flat shall pay" a specified sum "to the authorized agent or col-

lector of the city garbage crematory" for the garbage removed, although no charge is allowed for the removal of ashes and waste matter, except in excess of a certain designated amount. All these accumulations of garbage at any store, shop, business house, boarding-house, meat, vegetable, or fish stand, or other place not a private residence," must also be removed and burned in the city garbage crematory, but a different fee, estimated in another way, is fixed for such services from that authorized in the case of private residences.

After holding that the ordinance was fully authorized by section 11 of article XI of the State constitution, and that it was not unfair or discriminating or in violation of the constitutional provision respecting uniformity, the court expressly upholds the power of the city to exact a fee from householders for the removal of garbage, citing in support *Slaughter House cases*, 16 Wall., 36, and *Walker vs. Jameson*, 140 Ind., 591, and quoting with approval from Judge Hawley's opinion in the present case, delivered in the circuit court of appeals. (See *California Reduction Co. vs. Sanitary Reduction Works*, 126 Fed. Rep., 29.) In concluding its opinion, the supreme court of California says (p. 958):

"The removal and disposition of garbage, as well as the regulation of slaughter-houses in cities and towns, is peculiarly a subject of municipal control, as without proper regulation either might become an intolerable nuisance and dangerous to the health and lives of the citizens. * * * Ordinances and regulations enacted by such city in pursuance of its charter have the same force and effect within the limits of the city as laws passed by the legislature. They both spring from the same source,—the constitution enacted by the people in their sovereign capacity."

It will be noticed that in the Maine as well as in the California case the agent or appointee of the city was authorized to gather and collect the garbage on private premises and to remove it therefrom, while in the case now before this

court the orders refer only to garbage and other waste substances which have already been collected by others and removed to the public streets. The San Francisco orders relate to the disposition of the garbage alone, while the Portland and Oakland ordinances upheld in the above cases covered the collection of the garbage as well.

Respectfully submitted.

C. L. TILDEN,
SHELDON G. KELLOGG,
ALDIS B. BROWNE,
ALEXANDER BRITTON,
Counsel for Respondent.

APPENDIX "A."

(*Rec., p. 324.*)

ORDER No. 2965.

Granting to F. E. Sharon, his associates and assigns, the sole right and privilege to cremate garbage, house refuse, dead animals, and putrid vegetable matter, and material of a like character, as well as to dispose of the same by some process of reduction equally effective and unobjectionable, and to convert the same, or a portion thereof, into fertilizing matter and other substances, free of all cost or charge to said city and county, and making certain violations of this order misdemeanors.

Whereas the disposal of house refuse, butchers' offal, garbage, putrid or stinking animal or vegetable matter, refuse, ashes, or other like matter, by cremation, or by some process of chemical reduction, is the only effective means to dispose of the same to prevent the said matter and material from being deposited in or upon lots, lands and public streets situate in the city and county or in the waters of the bay, as heretofore, to the prejudice of the public health; and

Whereas under the provisions of an act of the legislature, entitled "An act providing for the sale of railroad and other franchises in municipalities, and relative to granting of franchises" (approved March 23, 1893), bids for a franchise were duly called for; and

Whereas F. E. Sharon was the highest and best bidder for the said franchise, as hereinafter recited, and all the forms and requirements of law necessary thereto being complied with; now, therefore,

The people of the city and county of San Francisco do ordain as follows:

In consideration of the sum of twenty-five hundred and ten dollars, the receipt of which is hereby acknowledged, and in consideration of the further payment of two per centum for the term of fifteen years from and after the date of this franchise, and the payment of five per centum for the re-

maining term of thirty-five years, on the gross amount of the receipts to be derived by the said F. E. Sharon, his associates or assigns, under this franchise, to be paid into the treasury of the city and county of San Francisco each and every year during the continuance of this franchise, the franchise hereinafter recited is hereby granted to F. E. Sharon, his associates and assigns.

SECTION 1. The sole and exclusive right and privilege is hereby conferred upon and granted to F. E. Sharon, his associates and assigns, for a term of fifty years from and after the approval of this order, to cremate and destroy within the city and county aforesaid, by crematories or by a process of reduction, house refuse, butchers' offal, garbage, refuse, dirt, ashes, cinders, sludge, crockery, tins, bones and other like matter, and any dead animals (not otherwise provided for by contract or franchise heretofore granted), and putrid vegetable matter, and fish, flesh and food condemned by the board of health of said city and county as unfit for human food, and the said grantees, their associates and assigns, shall have the right and privilege to charge and collect therefor not exceeding the sum of twenty cents per load, such load not to exceed a cubic yard, on the delivery of the above material or substances at the plant or works where the crematory or reduction plant is established.

SECTION 2. The grantees, their associate and assigns, shall within a period of twenty-four (24) months after the granting of this franchise, unless the time is extended therefor by this board, have fully erected and constructed and in operation a suitable building or buildings, and equip, fit up and install the same with the necessary crematories machinery, tools and appliances required to cremate and destroy by cremation, or by a process of reduction, all obnoxious germs and elements contained in house refuse, butchers' offal, garbage, refuse, dirt, ashes, sludge, crockery, tins, cinders, bones and other like matter, and any dead animal and putrid vegetable matter, and fish, flesh and food condemned by the board of health as unfit for human food, the works to be constructed to cremate or reduce at least three hundred tons per day of the materials specified in this section, and the capacity to be increased as required from time to time.

SECTION 3. From and after the erection and construction of the buildings referred to in section 2 of this order it shall be unlawful for any person or corporation to remove through

the public streets from any houses, hotels, markets, hospitals, factories, restaurants, stores or any other like building or place in the city and county, any refuse, butchers' offal, garbage, dirt, ashes, cinders, sludge, crockery, tins, bones, or other like matter, or any putrid animal or vegetable matter, or any fish, flesh or food condemned by the board of health as unfit for human food, or dead animals whose removal is not otherwise provided for by contract or franchise heretofore granted, unless the same shall be removed through said public streets in closed vehicles and wagons constructed so as to conceal the contents from public view, and to effectually prevent any smell escaping therefrom, as well as to prevent the droppings of any portion of such material or substances on or upon the public streets, and which said vehicles and wagons shall be constructed in accordance with specifications approved by the board of health of said city and county.

SECTION 4. From and after the erection and construction of the buildings referred to in section 2 of this order it shall be unlawful for any person or corporation to dump or place upon any land within said city and county, or in any water or waterways within said city and county, any refuse, butchers' offal, garbage or other material mentioned in section 3 of this order, but such refuse, butchers' offal, garbage and other material shall be forthwith delivered to the crematory herein provided for, and there, at the expense of the person or corporation so conveying the same, be cremated or destroyed or subjected to such disposition and treatment as will at once secure and effect a complete combustion of all gases and odors arising therefrom.

SECTION 5. The said grantees, their associates and assigns, on receipt of any of the material or substances specified in this order, shall within twenty-four (24) hours thereafter cremate or reduce the same, or shall subject the same to such process as will secure the complete combustion of all gases or odors arising therefrom. The said grantees, their associates and assigns, shall maintain and operate their plant and crematory or crematories, or other apparatus, and the matter and substances received, so as to prevent any obnoxious smells or gases being emitted either from the deposits of such matter or substances on their premises or from the process of cremation or other treatment thereof, or from the residuum remaining after cremation or treatment as afore-

said; also, that in the operation of said works no smoke or soot shall be emitted so as to constitute a nuisance.

SECTION 6. The said grantees, their associates and assigns, shall from and after the first day of December, 1902, have the sole and exclusive right and privilege during the continuance of the remainder of the term of this franchise to remove and dispose of the carcasses of all dogs killed at the public pound, and all animals impounded and not redeemed by the owners thereof, and which are valueless and cannot be sold; also, to remove and dispose of the carcasses of all dead animals found upon the public streets, and the carcasses of all dead animals in said city and county not slain for human food, which shall not be removed and disposed of by the owners thereof so as not to become a nuisance within six hours after the death of the same; provided that in the event the parties now holding and exercising this privilege of removing the dead animals not slain for human food should hereafter fail or refuse to remove the dead animals and should forfeit their contract with said city and county, then immediately upon such forfeiture the right to remove said dead animals shall vest in the grantees herein, their associates and assigns under this order.

SECTION 7. This board will pass such orders as may be required from time to time to enable the said grantees, their associates and assigns, to enjoy and have the benefit of all the rights and privileges herein granted, and on the completion of the work will pass such other and additional orders as will enable the said grantees, their associates and assigns, to carry out the contemplated destruction of garbage, offal, house refuse and material mentioned in this order and the conversion of the substances herein named for fertilizing and other purposes, and for the segregation prior to delivery of garbage and offal from ashes and other refuse.

SECTION 8. The said grantees, their associates and assigns, shall at all times be subject to and conform to all health and sanitary regulations and requirements enacted and in force during the existence of this franchise. The said grantees, their associates and assigns shall receive no compensation whatever from the city and county for any service performed under the conditions of this order in disposing of the material and substances specified in this order.

SECTION 9. This franchise shall cease and determine upon the failure of the grantees, their associates and assigns, to

fully carry out and faithfully perform the obligations herein imposed, unless from unavoidable cause beyond the control or power of the grantees, their associates and assigns, by reason of any fire or other casualty, the operations and works shall be destroyed or temporarily suspended in their operation. The said grantees, their associates and assigns, in the event of an accident to or destruction of their works, shall, during the time such works cannot be operated, and until said works are repaired or reconstructed, and within such reasonable time as may be allowed and approved by this board, shall deodorize the material and substances specified in this order and dispose of the same as directed by this board, so as to prevent all noxious gases or odors escaping therefrom, until the said material or substances are cremated or utilized as provided by this order.

SECTION 10. All of the machinery and appliances used shall be of California manufacture, except such as are manufactured exclusively or patented in the Eastern States or abroad.

SECTION 11. The said grantees, their associates and assigns, shall, within a period of ten days from the date of the approval of this order, file with the clerk of this board their acceptance of its provisions and of this franchise.

SECTION 12. Any violation of the provisions of sections 3 and 4 of this order shall be, and are hereby, declared to be a misdemeanor, and punishable as such.

SECTION 13. This order shall take effect and be in force on and from its passage.

All orders or parts of orders in conflict with the provisions of this order are hereby repealed and made null and void.

And the clerk is hereby directed to advertise this order as required by law.

In board of supervisors, San Francisco, February 17, 1896.

Adopted by the following vote:

Ayes—Supervisors King, Scully, Hirsch, Dimond, Taylor, Morgenstern, Spreckles, Hobbs.

Noes—Supervisors Benjamin, Hughes, Dunker, Wagner.

JNO. A. RUSSELL, *Clerk.*

STATE OF CALIFORNIA,
City and County of San Francisco, } ss:

Office of the Board of Supervisors of the City and County of San Francisco.

I, John A. Russell, clerk of the board of supervisors of the city and county of San Francisco, State of California, do hereby certify:

That, as clerk of the said board of supervisors, I have charge and custody and am the legal keeper of all the minutes, records and archives of said board of supervisors.

I further certify that the annexed printed document is a full, true and correct copy of order No. 2965 of said board of supervisors, and that said order was passed by said board of supervisors on the 17th day of February, 1896, and was adopted by vote of the supervisors therein named as voting in the affirmative thereon, and which said order No. 2965 is of record and on file in my said office.

I further certify that at the date of the passage of said order, said board of supervisors consisted of the twelve supervisors whose names appear in said order No. 2965 as voting in the affirmative and negative thereon.

I further certify that said order was advertised under the direction of said board of supervisors as required by law.

In witness whereof, I have hereunto set my hand as clerk of said board of supervisors of the city and county of San Francisco, State of California, this 29th day of March, 1899.

JNO. A. RUSSELL,
Clerk of the Board of Supervisors of the City and County of San Francisco, State of California.

APPENDIX "B."

(*Rec., p.* 329.)

ORDER NO. 12 (SECOND SERIES).

Prohibiting the dumping of dirt, garbage, butchers' offal or putrid matter, etc., upon any lands in the city and county of San Francisco, or on the water front, or from any wharf or bulkhead in said city and county, and providing for the cremation and destruction of the same, and the duties of officers in relation thereto.

Whereas, from time to time during the last twenty years, the dumping of garbage, dirt, offal, horse refuse, stinking animals or vegetable matter, ashes, cinders, sludge, acids or like matter, to fill in lots and property and particularly in filling in water lots, became so objectionable and deleterious to the public health that various plans have been adopted to mitigate such nuisance; and

Whereas, while steps have been heretofore taken to abate such nuisance by covering the same over with sand it has become apparent that the lots so filled in have thrown off noxious gases, deleterious to the public health, and in case of the prevalence of any epidemic disease would become a fruitful source of danger to the sanitary well-being of our citizens; and

Whereas, the board of health from time to time has called attention to and condemned the disposition of such garbage and refuse matter in the filling of lots and have repeatedly urged the cremation of such substances to protect the public health; and

Whereas, in order to provide satisfactory means by which all such deleterious matter should be disposed of an exclusive franchise was, by order No. 2965 of this board, passed, February 17, 1896, sold by this city and county authorizing the cremation and destruction of such substances; and

Whereas, the Sanitary Reduction Works, the assignee and successor in interest of the grantee of such franchise, has

notified this board of the completion of their works and of their readiness to receive, cremate and destroy all of such substances in accordance with the terms and under the conditions of said franchise; now, therefore,

The people of the city and county of Francisco do ordain as follows:

SECTION 1. No person, company or corporation shall, on and after the 8th day of November, 1897, deposit, dump or cause to be dumped or deposited upon any street, lot or lands within said city and county, or in any water or waterways within said city and county, or from any wharf or bulkhead on the water front of said city and county, except as hereinafter provided, any house refuse, butchers' offal, garbage, refuse, dirt, ashes, cinders, sludge, broken glass, crockery, tins, bones, rubbish or other like matter, or any dead animals (not otherwise provided for by contract or franchise heretofore granted by the city and county), or putrid or stinking animal or vegetable matter or fish, flesh and food condemned by the board of health as unfit for human food.

All such refuse, butchers' offal, garbage, ashes, cinders, sludge, acids or other like substances or matter hereinbefore enumerated shall be delivered at and to the crematory of the Sanitary Reduction Works on the block bounded by Rhode Island, Alameda, De Haro and Fifteenth streets, in said city and county, and there at the expense of the person, company or corporation so conveying the same, be cremated and destroyed or subjected to such disposition and treatment as will secure and effect a complete combustion of all gases and odors arising therefrom as provided in the franchise aforesaid.

(*Penalty—Duty of Chief of Police.*)

SECTION 2. Any person, company or corporation violating the provisions of this order shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine not exceeding two hundred and fifty ($250) dollars, or by imprisonment for a term not exceeding one hundred days, or by both such fine and imprisonment; and it shall be the duty of the chief of police to take such steps and issue such orders to the members of the force under his com-

trol as shall insure the arrest and punishment of any and all persons violating the provisions of this order.

(Board of Health to Aid in Enforcement of Order.)

SECTION 3. It shall be and is hereby made the duty of the board of health to aid by all means in its power the enforcement of the provisions of this order.

SECTION 4. Order No. 2300 and all orders or parts of orders conflicting with the provisions of this order are hereby repealed.

In board of supervisors, San Francisco, November 1, 1897.

After having been published five successive days, according to law, taken up and passed by the following vote:

Ayes—Supervisors Haskins, Delaney, Sheehan, Dodge, Lackman, Rottani, Morton, Smith, Rivers.

Absent—Supervisors Devany, Britt, Clinton.

JNO. A. RUSSELL, *Clerk.*

Approved San Francisco, November 4, 1897.

JAS. D. PHELAN,
Mayor and ex Officio President of the Board of Supervisors.

STATE OF CALIFORNIA,
City and County of San Francisco, } ss:

Office of the Board of Supervisors of the City and County of San Francisco.

I, John A. Russell, clerk of the board of supervisors of the city and county of San Francisco, State of California, do hereby certify:

That as clerk of the said board of supervisors I have charge and custody and am the legal keeper of all the minutes, records, and archives of said board of supervisors.

I further certify that the annexed printed document is a full, true, and correct copy of order No. 12 (second series) of said board of supervisors, and that said order was passed by said board of supervisors on the 1st day of November, 1897, and was adopted by vote of the supervisors therein named as voting in the affimative thereon, and which said order No. 12 (second series) is of record and on file in my said office.

I further certify that at the date of the passage of said order, said board of supervisors consisted of the twelve supervisors whose names appear in said order No. 12 (second series) as voting in the affirmative and negative thereon.

I further certify that said order was advertised under the direction of said board of supervisors as required by law.

I further certify that order No. 12 (second series), having been passed by said board of supervisors was duly presented to and approved by the mayor and became the president of the board of supervisors on the 4th day of November, 1897.

In witness whereof, I have hereunto set my hand as clerk of said board of supervisors of the city and county of San Francisco, State of California, this 27th day of March, [illegible].

JNO. A. RUSSELL,

Clerk of the Board of Supervisors of the City and County of San Francisco, State of California.